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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 177

C. V. SORRELLS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 27, 1932

CERTIORARI GRANTED OCTOBER 10, 1932

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NORTH CAROLINA, ASHEVILLE DIVISION, NOVEMBER TERM, 1930

No. 5972, Criminal

UNITED STATES OF AMERICA

vs.

C. V. SORRELLS

BILL OF INDICTMENT—Filed Nov. 13, 1930

The grand jurors for the United States empaneled and sworn at the term aforesaid of the court aforesaid, on their oath present that C. V. Sorrells, late of Haywood County, on the 13th day of July, 1930, in said division of said district unlawfully and feloniously did possess a large quantity, to-wit, one-half gallon of intoxicating liquor, to-wit, [fol. 2] whisky, in violation of the National Prohibition Act, with intent to sell and furnish the same for beverage purposes; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Second Count. And the grand jurors aforesaid, upon their oath aforesaid do further present that said C. V. Sorrells, on the 13th day of July, 1930, in said Western District of North Carolina, unlawfully and feloniously did sell to one R. V. Martin, a large quantity, to-wit, one-half gallon, of intoxicating liquor, to-wit, whisky, in violation of the National Prohibition Act, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Signed) Thomas J. Harkins, United States Attorney.

Endorsed: No. 5972. United States District Court, Western District of North Carolina, Asheville Division. United States of America vs. C. V. Sorrells. Haywood. Indictment. NPA JA Poss. & Sale. Witnesses: M. A.

White, R. V. Martin, x. Those marked thus "x" sworn [fol. 3] and examined by the foreman of and in the presence of the grand jury. —— ——, Foreman. A true Bill. James A. Hannah, Foreman.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PLEA

And thereafter, to-wit: on the 20th day of November, 1930, the said C. V. Sorrells came to the bar of the court here in his own proper person and having hearing of the said Bill of Indictment, and forthwith being demanded of him concerning the premises in said Bill of Indictment above specified, and charged upon him how he will acquit himself thereof, the said C. V. Sorrells doth say that he is not guilty thereof, and thereof for good and evil he do put himself upon the country; and the said Thomas J. Harkins. Esq., and the said Frank Patton, Esq., Attorneys of the District aforesaid, who in this behalf prosecuteth does the like.

And whereupon, on the 20th day of November, 1930, the panel of petit jurors selected, drawn and returned to the Court here in pursuance of the Statute in such cases, made and provided, being called, come:

Whereupon certain of them to-wit: J. F. Hampton, Bill Williams, R. J. Worley, T. E. Blackstock, M. L. Maney, R. A. Leonard, R. C. Cooper, Earl Jackson, E. M. Owenby, C. H. Buckner, S. C. Morgan and R. O. Buckner, twelve good and lawful men, selected, tried and sworn as the law directs to well and truly try and true deliverance make of the said defendant upon the issue joined herein, and a true verdict [fol. 4] render according to the evidence, and are now duly impannelled to try this case.

IN UNITED STATES DISTRICT COURT

VERDICT—NOV. 20, 1930

Thereafter, to-wit, on November 20th, 1930, after the conclusion of the trial, the jury retired and upon return to open court announces its verdict as follows:

"We, the jury, find the defendant, C. V. Sorrells, guilty."

The defendant moves for an arrest of judgment which motion is overruled. The defendant objects and excepts and the exception is then and there allowed; the defendant moves the Court to set aside the verdict as contrary to the law and the evidence which motion is overruled and the defendant objects and excepts and the exception is then and there allowed; and the defendant moves to set aside the verdict for other errors occurring during the progress of the trial and which appear on the face of this record. The motion is overruled and defendant objects and excepts and the exception is then and there allowed.

IN UNITED STATES DISTRICT COURT

JUDGMENT

The defendant being present in Court, it is ordered and adjudged by the Court that the defendant be imprisoned in the United States Penitentiary at Atlanta, Georgia, for a period or term of eighteen months.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed March 3, 1931

A condensed and narrative form of the evidence offered by the government and the defendant in the above styled case, save as a proper understanding of the questions pre-
[fol. 5] sented may require that it be set forth otherwise.

Be it remembered that upon the trial of this case the government, to maintain the issue on its part, offered the following testimony:

M. A. WHITE, a witness for the government, being first duly sworn, testified as follows:

Examination.

By Mr. Patton:

Q. Your name is M. A. White?
A. Yes, sir.

Q. You are a prohibition officer?

A. Yes, sir.

Q. Were such officer on July 13th, 1930?

A. Yes, sir.

Q. Mr. White, the defendant, C. V. Sorrells, is indicted here for selling some whiskey on the 13th day of July?

A. On or about that date, in company with Mr. Martin, we went to Mr. Sorrells' home.

Q. Where is his home?

A. It's over in Haywood County, north of Canton—and he wasn't there the time we first visited there, and Mrs. Sorrells stated he would be in in something like an hour or two. We told her we would drive off and come back later on. We did, and we drove off and came back in about two hours, and when we came back that time Mr. Sorrells was not there, and we waited on him a while and started back to Canton, and met him, and when we got back to his house he was there, and we had a conversation with him about some whiskey. He went down below—in his house, and got a half gallon of whiskey, and brought it to the car, and said he would guarantee it would be all right. I tasted the whiskey there and gave him $6.00 for it. Later on, about two weeks, in company with Mr. Martin and Mr. Lance and myself, we went there and searched surrounding his premises, and about a hundred yards below his house, in a thicket, we found eleven one-half gallon fruit jars full of whiskey.

[fol. 6] Q. Where was that with reference to where he went after the half gallon of whiskey?

A. Exactly the same direction, and same way he went to get the half gallon of whiskey that day. We also found a ten gallon keg just above his house, out in the field, with three or four gallons of wine.

Q. Did he live in the country?

A. Yes, sir.

Q. How far from Canton?

A. I suppose some seven or eight miles.

Q. You only bought from him on one occasion?

A. I only bought on one occasion. Mr. Martin bought on one occasion. I wasn't there before this trip.

Cross-examination.

By Mr. Jordan:

Q. Mr. White, you say this was on the 13th of July?

A. I don't remember the date, Mr. Jordan.

Q. Well, it is alleged he sold it on the 13th of July, this year. I wish you would refresh your recollection and tell us, as a matter of fact that you were not there on the 13th of July?

A. Well, I think probably that—I am not sure that is the date, but that could have been changed from two different ways. My letter report will show exactly when I was there, but sometimes we make a case on one date, and when the letter report is made out, we date it from the date we are writing the letter report, and the record there shows on the 13th. I am not positive it was the 13th.

Q. Well sir, the bill of indictment under which this man is being tried, alleges he sold this liquor on the 13th day of July, 1930, and sold it to R. V. Martin. As a matter of fact the 13th of July was on Sunday. Were you ever at his house on Sunday?

A. No, sir. I don't think so. Mr. Martin was there when I went there.

Q. But you were not with Mr. Martin the first time?

A. No, sir.

Q. So the time you are testifying about now was not on the 13th of July, and wasn't on a Sunday?

A. No, sir.

Defendant moves that all of the testimony of this witness be stricken from the record, for that Defendant is indicted in the bill for the sale of liquor on the 13th day [fol. 7] of July, 1930, to R. V. Martin; this witness has testified that at another time, not mentioned in the bill, he went there and purchased liquor; the Defendant is not on trial for that, and was not apprised by the bill that he was indicted for that.

Mr. Patton: We are going to introduce evidence that he sold some to Mr. Martin on the 13th.

The Court withholds passing on Defendant's motion.

Defendant Excepts.

There being no further questions, witness stood aside.

R. V. MARTIN, a witness for the government, being first duly sworn, testified as follows:

Martin testified that he was a Federal Prohibition Agent and that on the 13th day of July, 1930, which was a Sunday, he visited the home of the Defendant C. V. Sorrells and in consequence of a conversation had with the defendant the defendant went off and returned shortly with a half-gallon of liquor for which the witness paid defendant the sum of $5.00. The witness further testified that he went to the home of the defendant again, accompanied by Federal Prohibition Agent, M. A. White, and the followinng testimony was had:

Q. You went with Mr. White?
A. Yes.
Q. When was that?
A. That was in August, I don't remember the exact date.
Q. Have you got any record of it?
A. Yes.
Q. Where is it?
A. I have a copy of my report. I didn't bring it with me, but I recall

Defendant objects.

The Court: Was it before or afterwards?
A. This? On the 13th day of July was when I went by myself and later in August agent White and I went out and purchased another half gallon which was delivered by the same man, Mr. Sorrells.

[fol. 8] Defendant objects to the questions and answers and moves that the questions and answers be stricken from the record.

Motion and Objection overruled.

Defendant Excepts.

On cross-examination the witness testified that he had been a Federal Prohibition Agent since January 6th, 1930, and that shortly before the alleged offense on the part of the defendant the witness went to Haywood County, N. C., accompanied by his wife and resided for a time in the village of Clyde, N. C., where he posed as a tourist. That he visited the home of the defendant on July 12th, 1930, at which time

the defendant was not at home and that he made such trip in company with two or three young men who were residents of the community in which the witness was temporarily staying. That on Sunday afternoon, July 13th, 1930, the witness again visited the home of the defendant, accompanied by Fanning Lowe, E. D. Jones and C. J. Snyder. That upon their arrival at the home of the defendant the witness was introduced to the defendant by Fanning Lowe the witness being introduced as a resident of Charlotte, N. C., and a tourist stopping for the time being at Clyde, N. C. That the witness had a considerable conversation with the defendant, lasting between fifteen and thirty minutes and that during the conversation the witness ascertained that the defendant was a veteran of the World War and a former member of the 30th Division A. E. F. That the witness informed the defendant that he, the witness, was also an ex-service man and was also a former member of the 30th Division A. E. F., which in reality was the truth. That the witness asked the defendant if he, the defendant, could get him, the witness, some liquor and that at first the defendant stated that he did not have any liquor. That later in the conversation the witness again asked the defendant if he, the defendant, could get him, the witness, some liquor and that there was further conversation between the two relative to the [fol. 9] securing of some liquor. That at the time of such conversation one of those present to-wit, E. D. Jones, was also an ex-service man and a former member of the 30th Division A. E. F. and some conversation was had between all present relative to the war experiences of the witness, the defendant and E. D. Jones. That the witness a third time asked the defendant to get him, the witness, some liquor and thereupon the defendant left his home and was gone a few minutes and came back with a half-gallon of liquor for which the witness paid the defendant the sum of $5.00. That the witness was the first and only person among those present at the time who said anything about securing some liquor and was the first person to mention the subject. That the witness at the time he asked the defendant to secure some liquor for him, the witness, did so with the express view and purpose in mind to indict and prosecute the defendant for procuring and selling the liquor and that such was the purpose of the witness when he went to the home of the defendant and procured the liquor. That after the witness pro-

cured the liquor from the defendant, the witness went before the United States Commissioner and took the proper steps to have the defendant arrested and subsequently tried for the said offense.

The government then rested its case and the defendant thereupon moved the Court for a directed verdict of not guilty or for a motion as of non-suit. The motion was overruled. The defendant objected and excepted and the exception was then and there allowed.

Defendant's Testimony

E. D. Jones, a witness for the defendant, being first duly sworn testified as follows:

That the witness was a resident of Clyde, N. C., which is in Haywood County, and was an ex-service man and a former member of the 30th Division A. E. F. That the witness became acquainted with the Federal Prohibition Agent, R. V. Martin, while the said agent was residing in Clyde, N. C., and the witness, together with C. J. Snyder and another man visited the home of the defendant on the [fol. 10] afternoon of Sunday, July 13th, 1930, and upon arrival the witness introduced the agent to the defendant; the witness stating to the defendant that the agent was an old 30th Division man and that the agent thereupon stated to the defendant that he, the agent, would like to get a half-gallon of good whiskey to take back to Charlotte, N. C. to a friend of his that was in the furniture business with him, the agent, and that the defendant replied to such request with the statement that he, the defendant, did not fool with whiskey. That after some conversation the agent again asked the defendant to get him some whiskey and the defendant stated that he would go and see if he could get a half-gallon of liquor, and that the defendant left his home and was gone between twenty and thirty minutes and upon his return delivered to the agent a half-gallon of whiskey. That the witness and the prohibition agent and the others were at the home of the defendant for probably an hour or an hour and a half and that during such time, the agent asked the defendant three or four or probably five times

to get him, the agent, some liquor. That the agent, Martin, was the first person to mention anything about liquor and that he, the agent was the first person to ask the defendant for liquor. That the witness introduced the agent to the defendant as a furniture dealer of Charlotte, N. C. because the agent had represented himself to the witness as being in the furniture business in Charlotte, N. C. That the witness and the defendant soldiered together in France as members of the 30th Division A. E. F.

On cross-examination the witness testified that he was by profession a brakeman on the railroad and at the time of the trial had been cut off from his employment for about six months. That he was a married man, then living at home with his father on the farm. That on the 13th of July, 1930, the agent, Martin, met the witness at a filling station and asked him, the witness, to get in the agent's car and take a ride; that after the witness had got in the car of the agent, the agent stated that he was going to the home of the defendant to get some good whiskey and that at that time the witness had never heard of the defendant [fol. 11] being in the liquor business. That the witness did not tell the agent that he did not know the defendant was in the liquor business because he, the witness, had been in the army with the defendant. That they, the defendant and the witness were two old buddies. That the witness believed that one former war buddy would get liquor for another. That the witness had taken a drink in the past six months, but did not want to tell who gave him a drink except, the witness stated, that the agent, Martin had given him a drink. That the witness had been convicted in 1920 for carrying a pistol and was fined $50.00 and costs and that the witness had been convicted for fighting and had paid a fine of $10.00 and costs, and that the witness had been convicted once for intoxication and that that was all the witness had ever been convicted of. That the witness knew that the defendant was an employee of the Champion Fiber Company of Canton, N. C., and had been employed by that company since 1924 and was still employed by such company at the time of the trial, and that the defendant worked every day; that the witness while he was employed by the railroad was engaged in switching on the Canton,

N. C. railroad yards of the Southern Railway, which is where the company is located for whom the defendant worked and that the witness saw the defendant at work practically every day.

C. W. STEVENS, a witness for the defendant, being first duly sworn, testified as follows:

That the witness was twenty-four years of age, a resident of Canton, N. C., in Haywood County, N. C., that he had known the defendant about twelve or fifteen years. That he knew the character and general reputation of the defendant in the community in which the defendant lived, and that the character of the defendant was good. That the witness was the Time-keeper and Assistant Paymaster of the Champion Fiber Co. at Canton, N. C., and that the defendant was at the time of the trial and had been for about seven years prior thereto an employee of the Champion Fiber Company, and that the defendant had been on his job continuously without missing a pay day since March, 1924, and the witness identified the original time-[fol. 12] sheet or payroll of the defendant showing his employment to have commenced in March, 1924, and continued through the last pay-roll prior to the trial of the defendant, to-wit: October 31st, 1930.

There being no cross-examination, the witness stood aside.

C. J. SNYDER, a witness for the defendant, being first duly sworn testified as follows:

That the witness was seventeen years of age, a resident of Haywood County, N. C., and that on the afternoon of Sunday, July 13th, 1930, the witness accompanied E. D. Jones and Prohibition Agent Martin, to the home of the defendant, where the agent, Martin, was introduced to the defendant by Jones. That there was some talk and conversation and then the agent, Martin, asked the defendant if he, the defendant, could get him, the agent, some liquor and that the defendant told the agent that he, the defendant, did not have any and did not fool with it at all. That there

was then some further conversation during which the agent, Martin, stated that he was a furniture dealer from Charlotte, N. C., and that he, the agent, again asked the defendant about getting some liquor. That the agent, Martin, asked the defendant three or four times to get some liquor before the defendant went off and returned with the whiskey.

On cross-examination the witness denied that he sold liquor or that he had agreed to sell some to the Agent, Martin. That the witness lives near Clyde, N. C., with his father on a farm and that he, the witness, had never been convicted in his life for anything. That the witness did not know that the agent, Martin, was an officer. That he, the witness, knew the defendant pretty well but denied that he, the witness, had ever bought any liquor from the defendant. That the witness had taken a drink of liquor [fol. 13] and that the agent, Martin, was the first and only man who ever gave the witness a drink of whiskey and that he, the witness, had not drunk any liquor since the agent, Martin, had left Haywood County, N. C.

On cross-examination the witness testified that at no time while he was in the company of the agent, Martin, did the agent ever ask him, the witness, anything concerning his age.

Fanning Lowe, a witness for the defendant, being first duly sworn testified as follows:

That the witness lives in Haywood County, N. C., about three or four miles from the home of the defendant and that he, the witness, was present at the home of the defendant on the afternoon of Sunday, July 13th, 1930, and was present when the agent, Martin, and the others arrived at defendant's house. That the agent, Martin, and his companions were at the home of the defendant something like an hour and a half and that the agent, Martin, asked the defendant about some liquor and that the defendant answered that he did not fool with it. That the agent, Martin, asked the defendant again about getting some liquor and that the defendant again replied that he did not fool with it. That the agent, Martin, was the first person in the crowd who

said anything about liquor and that he asked the defendant to get some liquor three or four times before the defendant went off and returned with the whiskey. That the witness had never been convicted of anything in his life and that the agent, Martin, said he was a furniture agent from Charlotte, N. C.

On cross-examination the witness testified that he was pretty well acquainted with the defendant and that he was in the defendant's home when the agent, Martin, arrived. That on Saturday, the day before the alleged offense, the [fol. 14] witness went with the agent, Martin, to the home of the defendant but the defendant was not at home and that on that occasion nothing was said about getting any liquor. The witness denied that he had ever told the agent that he and the defendant had made some liquor and the witness further testified that he did not fool with liquor except to occasionally take a drink and that the only liquor which the witness had drunk in a period of three months prior to the trial was what the agent, Martin, had given him. The witness further denied that he had ever agreed to sell the agent, Martin, ten gallons of liquor for $90.00, and further denied that he had ever offered to sell the agent any liquor at any price. That the witness was thirty-two years old and that the only liquor the witness had ever drunk was that given him by the agent, Martin.

E. M. Suttles, a witness for the defendant, being first duly sworn, testified as follows:

That he was a boy seventeen years of age and had never been convicted of anything in his life. That he met the agent, Martin, and accompanied him on one of his, the agent's trips and that the agent, Martin, on two occasions had given the witness liquor.

On cross-examination the witness testified that he was a witness in the trial because he had been summoned to appear and attend the trial and that he was not related to the defendant.

W. S. Smathers, a witness for the defendant, being first duly sworn testified as follows:

That the witness lived about three and a half miles north of Canton, N. C., and was by occupation a farmer.

That he had lived in Haywood County all his life and had known the defendant for about twelve years. That the witness knew the character and general reputation [fol. 15] of the defendant in his, the defendant's community and that it was good.

On cross-examination the witness testified that he knew nothing about the defendant selling any liquor.

H. P. HARRISON, a witness for the defendant, being firs' duly sworn testified as follows:

That he was a railway switchman and had lived in Haywood County, N. C., for eighteen years. That he had known the defendant for five or six years and that the defendant's general reputation was good.

There being no cross-examination, the witness stood aside.

L. D. WEST, a witness for the defendant, being first duly sworn, testified as follows:

That the witness was a farmer and had lived in Haywood County all of his life. That the witness had known the defendant for ten years and that the defendant's character was good.

There being no cross-examination, the witness stood aside.

The defendant rested and renewed his motion for a directed verdict of not guilty, or for a judgment as of nonsuit.

The motion was overruled and the defendant objected and excepted and the exception was then and there allowed.

[fol. 16] PROSECUTION'S REBUTTAL

M. A. WHITE, having heretofore testified as a witness of the United States, was recalled and testified further as follows:

That the witness on August 28th, 1930, went to the home of the defendant and the following testimony was had:

Q. Mr. White, did you buy some whiskey from this defendant, Sorrells?

Defendant objects.
Objection overruled.
Exception.

The Court: I do not think he can show by this witness that defendant committed some other kind of offense. * * * I think you can allege one sale of liquor and show a dozen. You can show he sold liquor. Go ahead and tell us about that transaction on the 28th.

A. On August 28th of this year—that other was on the 13th (of July), and this was the 28th of August—we went out to Mr. Sorrells' place, Mr. Martin and myself, and Mr. Sorrells came out to the automobile where we were—that is this gentleman right here—and I told him I wanted a half gallon of good whiskey, and he said that he had some good whiskey, and he and Mr. Martin go down the road about a hundred yards—about fifty yards or something like that, and turns off and goes down into a swamp, and comes back with a half gallon of whiskey in his possession, and I paid him for it right there at the car, in the presence of Mr. Martin.

Q. Now, did you go back there later?

A. Well, later on, I think it was along in September, I don't just remember the date, although I can refer to the date by looking at my record——

[fol. 17] Defendant objects, for that witness is testifying about an entirely different transaction.
Objection Overruled.
Exception.

(Witness continues:) Well, in company with Mr. Owens and Mr. Lance, we went back out there with a search warrant, and we looked around Mr. Sorrells' place there, and we didn't search his house, but we searched on the outside about 75 yards from his house, down in a thicket, we found eleven one-half gallon fruit jars, full of whiskey, and around a log, covered up with some brick and dirt, just

above his house, we found a ten gallon keg with about three and a half gallons of wine.

Mr. Patton: Where did you find this liquor, with reference to where he went to when he brought that half-gallon you bought?

A. In reference to where he went to, he went down in this same thicket, turned around and went into the thicket where he got the half-gallon I first bought from him. We went identically in the same direction, and to the same place where he had brought this first half-gallon from.

The defendant without waiving his former objection to the questions and answers of this witness and preserving his rights to such objections, cross examines the witness as follows:

On cross-examination the witness testified that he went to the home of the defendant on August, 1930, in company with the agent, Martin. That the witness himself is and was a Prohibition Agent and that the agent, Martin, had stated to the witness that he, Martin, had previously bought a half-gallon of liquor from the defendant and that the said Martin was in the army with the defendant. That the agent, Martin, told the witness that the defendant had a very bad reputation for selling whiskey and that Martin [fol. 18] and the witness would go back to the home of the defendant to ascertain whether or not such report was correct and that they did go back and see if the defendant was continuously selling whiskey. That the trip to the home of the defendant in 1930 was the first time the witness had ever seen the defendant but was not the first time the witness had heard of the defendant. That the witness made the trip as aforesaid for the purpose, if he could, of buying liquor from the defendant and denied that he went to the home of the defendant for the purpose of indicting the defendant in the event, he, the witness, was successful in securing liquor from the defendant. That the witness went to the home of the defendant in compliance with orders issued to him, the witness, by his superior officer and the witness refused to answer directly the question "Did he, the witness, go to the home of the defendant for the purpose of buying liquor and if successful, to thereupon indict the defendant for such offense?" But on the contrary, the

witness only answered that his purpose in going to the home of the defendant was, "Just like all the cases I have made in the last ten years, was to do justice to the defendant, to the Government, and make my report accordingly." That the defendants in all cases except three which I had been up by the witness since he had been a Prohibition Agent had been indicted and convicted.

CHARLES BRANTON, a witness for the Government, being first duly sworn, testified as follows:

That the witness knew the defendant and knew his general reputation and that it was bad for liquor.

On cross-examination the witness testified that he lived at Bryson City, N. C., which is about fifty or fifty-five miles from Canton, N. C., and that the witness operated in seven counties which include the County of Haywood. That he had heard of the defendant for the past three or four years and had heard that he was a liquor runner but had never heard that the defendant worked for the Fiber Company until he heard it during the trial. That the witness passed [fol. 19] through Canton, N. C., about once a month and that the witness knows of people who work every day in an adjoining county and every night that they are in a car with a load of liquor.

ROBERT HOWELL, a witness for the Government, being first duly sworn, testified as follows:

That he was an officer of Haywood County and knew the defendant and that his general reputation was that of a rum runner or liquor man.

On cross-examination the witness testified that he was a regular deputy sheriff and lived about sixteen miles from the defendant and that he had known the defendant for about three years.

F. H. MOODY, a witness for the Government, being first duly sworn, testified as follows:

That the witness lived in Waynesville, N. C., and was an officer of Haywood County, to-wit: the County Jailer.

That the witness knew the defendant and that his general reputation was that of a rum runner.

On cross-examination the witness testified that he had been an officer for three years and that his term of office expired in the month following that at which the trial was had. That the witness liked the defendant and knew that the defendant had worked for the Champion Fiber Company for seven or eight years.

J. B. BANKS, a witness for the Government, after being duly sworn, testified as follows:

That the witness knew the defendant and knew his gen- [fol. 20] eral reputation since February, 1930, and that he had a number of reports that the defendant was a liquor dealer.

On cross-examination the witness testified that he did not consider the defendant's character good. That in response to the question, "What is a man's character if you know?" The witness answered, "Well, a man's character is what he does, his general conduct in the community."

The Government then rested.

DEFENDANT'S MOTION FOR DIRECTED VERDICT

At the conclusion of all the testimony, the defendant moved his motion for a directed verdict of not guilty or for a judgment as of non-suit.

The motion was overruled and the defendant objected and excepted and the exception was then and there allowed.

The defendant then presented to the Court the following written request for instructions, which said instructions were denied and each instruction marked by the Court on the margin thereof "Not Given." The defendant objected and excepted and the exception was then and there allowed.

Defendant's Request for Instructions

The defendant respectfully requests the Court that the Jury be charged in part as follows:

1

The Court charges you as a matter of law that where officers of the law have incited a person to commit the crime charged, and lured him on with the purpose of arresting him in its commission, the law will not authorize a verdict of guilty.

Not given.

[fol. 21]

2

The Court charges you that the question of entrapment is not a question of law, but is a question of fact and is to be determined as a fact by the jury.

Not given.

3

If the jury find as a fact that the defendant in this case was induced to sell to the officers of the law the liquor as alleged in the bill of indictment and that such inducement on the part of the officers was for the purpose of arresting the defendant and convicting him of such charge that the jury will in such event return a verdict in favor of the defendant.

Not given.

4

If the jury shall find as a fact that the idea of the violation of the law as charged in the bill of indictment originated in the mind of the officer of the law and following such the defendant was induced to violate the law, such conduct on the part of the officer amounts in law to an entrapment, and the jury shall return a verdict in favor of the defendant.

Not given.

Respectfully submitted.
(Signed) J. Y. Jordan, Jr., Attorney for Defendant.

Charge to the Jury

The Court thereupon charged the jury as follows:

"Gentlemen of the Jury, the defendant's counsel takes [fol. 22] the position that this evidence shows that this man was induced or entrapped to sell liquor. The Court holds as a matter of law that was not the case, and the Court instructs that if you believe the testimony of Mr. Martin, the witness who said he bought a half gallon from the defendant. You will convict him then. You will take the case and go out with it, or you can form your opinion here."

Following the charge by the Court to the jury and before the jury retired to make up its verdict, the defendant objected and excepted to the charge of the Court.

The jury thereupon found the defendant guilty, whereupon the defendant moved for an arrest of judgment, which motion was overruled, and the defendant objected and excepted and the exception was then and there allowed.

The defendant then moved the Court to set aside the vrdict as contrary to the law and the evidence, which motion was denied and the defendant thereupon objected and excepted and the exception was then and there allowed, and the defendant in open Court gave notice of appeal and it was ordered by the Court that the defendant have ninety days within which to perfect his said appeal.

The foregoing bill of exceptions appears to be correct.

Thos. A. McCoy, Assistant U. S. Attorney. J. Y. Jordan, Jr., Attorney for Appellant.

Order Allowing Bill of Exceptions

The foregoing Bill of Exceptions is correct and is hereby allowed.

This the 3 day of March, 1931.

E. Y. Webb, United States Judge.

[fol. 23] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed Feb. 11, 1931

And the said C. V. Sorrells, the defendant herein, assigns the following errors in the record and proceedings in said cause:

I

The District Court of the United States for the Western District of North Carolina, erred in its failure to strike from the record the entire testimony of M. A. White, the first witness introduced by the Government in the proceedings.

II

That the said Court erred in its failure to strike from the record and exclude from consideration by the jury of the testimony or that portion of the testimony of R. V. Martin, the second witness offered by the Government as appears in the record as follows:

Q. You went with Mr. White?
A. Yes.
Q. When was that?
A. That was in August, I don't remember the exact date.
Q. Have you got any record of it?
A. Yes.
Q. Where is it?
A. I have a copy of my report. I didn't bring it with me, but I recall

Defendant objects.

The Court: Was it before or afterwards?
A. This? on the 13th of July was when I went by myself and later in August Agent White and I went out and purchased another half gallon which was delivered by the same man, Mr. Sorrells.

Defendant objects to the questions and answers and [fol. 24] moves that the questions and answers be stricken from the record.

Motion and objection overruled.

Defendant excepts.

III

That the Court erred in that upon the completion of the testimony of the Government and upon the announcement by the Government that it had rested its case, the defendant moved the Court for a directed verdict of not guilty or for a judgment as of non-suit, which motion was overruled and the defendant then and there objected and excepted and the said exception was then and there allowed.

IV

That the Court erred in that at the conclusion of all of the testimony, the defendant renewed his motion for a directed verdict of not guilty or for a judgment as of non-suit which motion was overruled and the defendant then and there objected and excepted and the exception was then and there allowed.

V

That the Court erred in its failure to submit in its charge to the jury the written request for instructions which were in apt time tendered and which appear in the record herein.

VI

That the Court erred in its charge to the jury which said charge was as follows:

"Gentlemen of the jury, the defendant's counsel takes the position that this man was induced or entrapped to sell liquor. The Court holds as a matter of law that was not the case and the Court instructs that if you believe the testimony of Mr. Martin, the witness who said he [fol. 25] bought a half gallon from the defendant, you will convict him then. You will take the case and go out with it or you can form your opinion here."

The defendant in the presence of the jury before its retirement objected and excepted to the charge of the Court and the exception was then and there allowed.

VII

That the Court erred in its failure and refusal to set aside the verdict as contrary to the law and the evidence

upon the motion of the defendant, which motion was denied and the defendant objected and excepted and the exception was then and there allowed.

VIII

That the Court erred in imposing upon the defendant a sentence of eighteen months in the United States Penitentiary, the said sentence being cruel and unusual punishment forbidden by the constitution of the United States.

For which errors the defendant prays that the said judgment of the United States Court for the Western District of North Carolina, dated November 20th, 1930, be reversed.

J. Y. Jordan, Jr., Attorney for Appellant.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME

It appearing to the satisfaction of the Court that counsel for appellant has been unable to prepare and file in the United States Circuit Court of Appeals, the transcript of record on appeal in this case, it is, by consent, ordered that appellant's time for filing said transcript in the office [fol. 26] of the Clerk of the United States Circuit Court of Appeals, be, and the same is hereby, extended to April 19th, 1931.

This the 16th day of March, 1931.

(Signed) E. Y. Webb, United States District Judge for the Western District of North Carolina.

The foregoing order is consented to.

(Signed) Thomas A. McCoy, Asst. United States Attorney.

IN UNITED STATES DISTRICT COURT

MEMORANDUM OF CLERK RE APPEAL PAPERS

Petition for appeal filed 2-11-31.
Appeal allowed 2-9-31.

Appeal bond dated 11-21-30.
Penalty $500.00.
Obligors: C. V. Sorrells, T. C. Sorrells and Julie Sorrells, conditioned to pay costs.
Citation: Dated 2-9-31.

IN UNITED STATES DISTRICT COURT

STIPULATION OF COUNSEL RE TRANSCRIPT OF RECORD—Filed Apr. 2, 1931

It is hereby stipulated and agreed between counsel for C. V. Sorrells, Appellant, and the United States of America that the record in the case shall consist of the following: [fol. 27] (1) Bill of Indictment.
(2) Plea.
(3) Verdict.
(4) Judgment.
(5) Memorandum, Notice of Appeal, Petition for Appeal, Order Allowing Appeal.
(6) Bill of Exceptions.
(7) Assignment of Errors.
(8) Citation.
(9) This Stipulation.
(10) Clerk's Order to transmit Record.
(11) Order Extending Time to file Transcript of Record.
(12) Clerk's Certificate.

It is further stipulated and agreed between the parties hereto that the Clerk of this Court shall make up the transcript of the record in the above styled case and transmit the same to the United States Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, and that it shall be printed under the supervision of the Clerk of that Court in accordance with Rule 23.

J. Y. Jordan, Jr., Attorney of Record for C. V. Sorrells, Appellant. Thos. A. McCoy, Asst. United States District Attorney and Attorney of Record for the United States of America, Appellee.

[fol. 28] IN UNITED STATES DISTRICT COURT

ORDER OF TRANSMITTAL

And thereupon, it is ordered by the Court here, that a transcript of the record and proceedings in the cause aforesaid together with all things thereunto relating be transmitted to the United States Circuit Court of Appeals for the Fourth Circuit; and the same is transmitted accordingly.

J. Y. Jordan, Clerk United States District Court, by O. L. McLurd, Deputy Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 29] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 3168

C. V. SORRELLS, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville

DOCKET ENTRIES

April 6, 1931, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bond, and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of J. Y. Jordan, Jr., is entered for the appellant.

Same day, order extending the time to April 19, 1931, within which to file the transcript of record in this Court, is filed.

April 13, 1931, the appearance of Chas. A. Jonas, U. S. Attorney, and Thos. A. McCoy, Assistant U. S. Attorney, is entered for the appellee.

May 7, 1931, twenty-five copies of the printed record are filed.

[fol. 30] In United States Circuit Court of Appeals

Argument and Submission of Cause

June 18, 1931 (June term, 1931), cause came on to be heard before Northcott and Soper, Circuit Judges, and Way, District Judge, and is argued by counsel, and submitted.

In United States Circuit Court of Appeals

Order Restoring Cause to Docket for Reargument—Filed and entered November 11, 1931

For reasons appearing to the court, it is ordered that the above entitled case be, and the same is hereby, restored to the docket for a reargument to be had at the January term, 1932, of this Court.

Elliott Northcott, U. S. Circuit Judge.

November 11, 1931.

In United States Circuit Court of Appeals

Reargument and Submission of Cause

January 12, 1932 (January term, 1932), cause came on to be heard on reargument before Parker, Northcott and Soper, Circuit Judges, and is reargued by counsel, and submitted.

[fol. 31] IN UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT

No. 3168

C. V. SORRELLS, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville

(Reargued January 12, 1932. Decided April 13, 1932)

Before Parker, Northcott, and Soper, Circuit Judges

J. Y. Jordan, Jr., for appellant, and Thomas A. McCoy, Assistant U. S. Attorney (Chas. A. Jonas, U. S. Attorney, and Frank C. Patton, Assistant U. S. Attorney, on brief), for appellee.

OPINION—Filed April 13, 1932

PARKER, Circuit Judge:

The appellant, defendant in the court below and hereafter so designated in this opinion, was convicted of selling [fol. 32] intoxicating liquor in violation of the National Prohibition Act, and was sentenced to a term of imprisonment. His assignments of error present two points for our consideration: (1) that the trial judge withdrew from the jury the defense of entrapment, and (2) that the judge admitted evidence of a sale of liquor at a date subsequent to that charged in the indictment and constituting a separate and distinct offense.

On the question of entrapment, the evidence was that one Martin, a federal prohibition agent, went to the home of the defendant in the country near Clyde, N. C. with three other young men and was introduced by them to defendant as a furniture dealer of Charlotte. After some conversation, Martin asked the defendant to get him some liquor, stating that he wished to take it to his partner in Charlotte. Defendant at first denied that he had any liquor;

but after further conversation, in the course of which Martin several times asked defendant to get liquor for him, and in which it developed that defendant and Martin had been soldiers in the same army division in the World War, defendant left and in a few minutes returned with a half gallon of liquor which he sold to Martin for $5.00. Defendant did not take the stand, but introduced a number of witnesses who testified that he was a man of good character and regularly employed by a wood fibre plant near his home. The government in rebuttal introduced testimony to the effect that defendant bore the reputation of being a rum runner. The court admitted, over defendant's objection, testimony to the effect that about six weeks after the sale charged in the indictment, as to which the defense of entrapment was asserted, defendant at his home sold a half gallon of liquor to Martin and another prohibition agent.

We think that the judge properly instructed the jury that there was no evidence of entrapment. Taken in the light most favorable to the defendant, the record shows [fol. 33] nothing more than that the prohibition agent misrepresented his employment, concealed his official position and made a purchase of liquor from defendant with the intention of prosecuting him for the violation of law involved in the sale. The only inducements to the sale were the requests of the agent that defendant get liquor for him and the price paid for the liquor. The defendant knew that he was violating the law and must be presumed to have intended to violate it, and there is nothing in the evidence excusing the violation. The fact that the officer requested defendant to make the sale to him did not justify the latter in doing that which the law forbade.

The defense of entrapment can be maintained only where as a result of inducement the accused is placed in the attitude of having committed a crime which he did not intend to commit or where by reason of the consent implied in the inducement no crime has in fact been committed. Thus, the defense has been sustained where an accused, not intending to sell liquor to an Indian in violation of law, made a sale to an Indian disguised so as to mislead the accused as to his identity. U. S. v. Healy, 202 Fed. 349; Voves v. U. S. (C. C. A. 7th), 249 Fed. 191. In such case

the accused lacked the intent to violate the law and was placed in the position of violating it by the trick of officers of the law who deceived him as to the identity of the purchaser. He was thus beguiled, not into a known violation of the law, but into the belief that an unlawful act was in fact lawful. The defense was not sustained, however, in a case where Indians were sent by officers to purchase the liquor but were not disguised. United States v. Amo, 261 Fed. 106.

And the defense will be sustained in a prosecution for crimes such as larceny, where the want of consent of the person affected is an essential element of the crime, and where the inducement supplies the consent. State v. Adams, 115 N. C. 775, 20 S. E. 722; U. S. v. Whittier, 5 Dill. 35, Fed. Cas. No. 16,668; Rex v. McDaniel, Fost. Crown [fol. 34] Law 121, 2 East P. C. 665. But as said by Judge Dillon in Whittier's case, supra, "this principle must be limited to the cases where the consent will, as a matter of law, neutralize the otherwise criminal quality of the act." In this class of cases, which is the class in which the defense originated, the distinction is made that where the criminal design originates with the accused, and the owner of the property does not suggest the design or actively urge the accused on to the commission of the crime, the defense may not be asserted though the owner neglects to protect his property or furnishes facilities for the execution of the design; and this distinction with reference to the origin of the criminal design has been applied by some courts to cases as to which it properly has no application, as where the act committed is a crime irrespective of the consent of the party affected by it. See Butts v. U. S. (C. C. A. 8th), 273 Fed. 35, 18 A. L. R. 143 and note; O'Brien v. U. S. (C. C. A. 7th), 51 Fed. (2d) 674 and note.

But we think it clear that where the doing of a particular act is a crime, regardless of the consent of anyone, and where the accused has intentionally committed such an act, he is guilty of a violation of law, irrespective of the temptation under which he acted or the motive or identity of the person who tempted him. See note of Mr. Francis Wharton to Bates v. U. S., 10 Fed. 92, 97 et seq., cited with approval by the Supreme Court in Grimm v. U. S., 156 U. S. 604, 610. If notwithstanding the consent implied in the

solicitation the gist of the offense remains, the accused is guilty. Hanish v. U. S. (C. C. A. 8th), 227 Fed. 584, 586. As said by the late Chief Justice Clark of North Carolina in State v. Smith 152 N. C. 798, 67 S. E. 508, 30 L. R. A. (N. S.) 946, a prosecution for the unlawful sale of intoxicating liquor, "it is not the motive of the buyer, but the conduct of the seller, which is to be considered."

[fol. 35] In the note of Mr. Wharton above mentioned, it is said:

"The only exceptions known to the principle before us exist (1) in cases in which to the offense it is essential that it should be 'against the will' of the party injured; and (2) in cases in which the offense consists in certain physical conditions which cannot exist if a trap be laid.

"(1) When it is a condition to an offense that it should be 'against the will' of the party injured, then there must be an acquittal should it appear that such party invited the defendant to the commission of the offense. This is the case with regard to prosecutions for rape: Reg. v. Fletcher, Bell, 63; 8 Cox, C. C. 131; Com. v. McDonald, 110 Mass. 405; Brown v. People, 36 Mich. 203; State v. Burgdor, 53 Mo. 65; Walter v. State, 40 Ala. 325; to prosecutions for highway robbery: Rex v. McDaniel, Fost. 121, 128; Long v. State, 12 Ga. 293; to prosecutions for assaults, which are not in themselves offenses against the public peace: Rex v. Wollaston, 12 Cox, C. C. 180.

"(2) When there are physical conditions of an offense inconsistent with a trap, so that these conditions cannot exist when there is a trap, then the defendant must be acquitted. The most striking illustration of this exception is to be found in the case of burglary already noticed. There can be no prosecution for burglary in cases where the door of the house was opened by its owner to give the burglar entrance.

"Whether, when the offense is the special product of the trap, the defendant can be convicted, depends upon the exclusiveness of the causal relationship between the offense and the trap. When the defendant was the passive tool of the entrapping party then there should be an acquittal. On the other hand, the defendant ought not to escape conviction in any case (with the exceptions above given) in

which he knowingly committed the offense. The most frequent cases under this head are prosecutions for illicit sales of liquor. In an English trial in 1881 (Rex v. Titley, [fol. 36] see London Law Times, July 30, 1881) a conviction of this class, when the sale was induced by the adroitness of a detective, was sustained, though it became subsequently the subject of much discussion in the house of commons. In Scotland (Blaikie v. Linton, 18 Scottish L. R. 583) a similar conviction in 1881 was set aside by the court of justiciary on the ground that the offense was the product of the solicitation. But this can only hold good in cases in which the offender's action is not imputable to his free agency."

It is to be noted that the Supreme Court has given no countenance to the doctrine of the cases which hold that a violator of the law is to be acquitted because the violation for which he is being prosecuted has been induced by the solicitation of officials of the government. On the contrary, that court has treated the acts of the officers, not as excusing the crime of the accused, but merely as furnishing an opportunity for its commission with a view of ascertaining whether the accused is engaged in an unlawful business. Grimm v. U. S., 156 U. S. 604; Goode v. U. S., 159 U. S. 663; Rosen v. U. S., 161 U. S. 29; Andrews v. U. S., 162 U. S. 420; Price v. U. S., 165 U. S. 311. Most of these are "decoy" letter cases; but there is no difference in principle between the case of an officer of the government who writes a letter soliciting an accused to commit a crime and an officer who personally solicits its commission. In both cases the crime is committed because the officer solicits it; and in both the porpose of solicitation is, not to make criminals, but to detect those who are engaged in criminal practices.

It is suggested that in the Supreme Court cases cited, the officers had reasonable grounds to suspect that the accused persons were engaged in a violation of law; and some cases have gone so far as to hold that where the defense of entrapment is asserted the burden rests upon the government to prove that in making purchases the officers acted upon reasonable grounds of suspicion. These cases [fol. 37] lay down a ground of distinction, however, which as a practical matter is impossible of application. It is for the jury to pass upon a defense of entrapment where

there is evidence supporting the defense; and to recognize the distinction suggested would be to open up before the jury an inquiry into the suspicions and information of officers of the law which would necessarily confuse the issue before them. But the distinction has no foundation in principle. The accused in such cases is not being tried for conducting a business, but for doing the specific thing which he has done because of the solicitation of the officer. He would not have done that thing but for the officer's conduct; and the only question is whether that conduct is to be treated as purging the act of the accused of its criminality or merely as affording an opportunity to the accused of committing the crime. The Supreme Court has taken the latter view of the matter, and reasonably so. Officers of the law are entitled to the presumption that they are acting in good faith and that in making purchases of liquor and narcotics, in sending decoy letters, etc., they are not engaged in an attempt to manufacture crime for the purpose of prosecuting it, but are attempting to apprehend those who are engaged in violating the law. If in response to their solicitation an accused violates the law, his offense is no less a violation because the opportunity to commit it has been afforded by the act of an officer.

The argument that in such case the criminal design arises not in the mind of the accused but in the mind of the officer is fallacious. The criminal design is the design on the part of the accused to violate the law; and that design, whatever the temptation, arises as a matter of fact in the mind of the accused. What the officer furnishes in such case is, not the criminal design or intent, but the temptation. Even if the inducement to crime be assumed to exist, the allegation of the defendant, as was well said in Onon-[fol. 38] daga County Com'rs v. Backus, 29 How. Pr. (N. Y.) 33, "Would be but the repetition of the plea as ancient as the world, and first interposed in Paradise: 'The serpent beguiled me and I did eat.' That defense was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say Christian ethics, it never will."

While courts in some of the federal circuits have seemingly given their approval to the broad doctrine that inducement on the part of government officials is a sufficient defense for one charged with the sale of intoxicating liquors in violation of law, such holding is contrary to the weight of authority on the subject. State v. Smith, supra, 152 N. C. 798, 67 S. E. 508, 30 L. R. A. (N. S.) 946; Bauer v. Com., 135 Va. 463, 115 S. E. 514; State v. Rippey, 127 S. C. 550, 122 S. E. 397; State v. Gibbs 109 Minn. 247, 123 N. W. 810, 25 L. R. A. (N. S.) 449; Gordon v. State 7 Ga. App. 691, 67 S. E. 893; Borck v. State, — Ala. — 39 So. 580; Strother v. State 15 Ala. App. 106 72 So. 566; Onondaga County Com'rs v. Backus 29 How. Pr. (N. Y.) 33; Tripp v. Flanigan 10 R. I. 128; French v. State 149 Miss. 684, 115 So. 705; Wilson v. City of Roanoke, — Ala. — 135 So. 312; Whittington v. State 160 Ark. 257, 254 S. W. 532; Hadley v. U. S. (C. C. A. 8th) 18 Fed (2d) 507; Corcoran v. U. S. (C. C. A. 8th) 19 Fed. (2d) 901; DeLong v. U. S. (C. C. A. 8th) 4 Fed. (2d) 244; Zucker v. U. S. (C. C. A. 3d) 288 Fed. 12; Lucadamo v. U. S. (C. C. A. 2d) 280 Fed. 653; U. S. v. Reisenweber (C. C. A. 2d) 288 Fed. 520; Smith v. U. S. (C. C. A. 8th) 284 Fed 673; Goldstein v. U. S. (C. C. A. 7th) 256 Fed. 813. And see notes 30 L. R. A. (N. S.) 946; 17 Ann. Cas. 296; 18 A. L. R. 162; 66 A. L. R. 488; 16 C. J. 88, 89; 8 R. C. L. 129.

Defendant relies upon expressions contained in the [fol. 39] opinion of this court in Newman v. U. S. 299 Fed. 128, 131, to the effect that the government is estopped to prosecute where the criminal design originates, not with the accused, but with the government officers. The Newman case is authority for the proposition that defendant there was not entitled to certain instructions on entrapment, to the refusal of which he excepted; but in so far as the language of the opinion goes beyond this, it is not controlling. If it be understood as laying down the rule that one who knowingly and intentionally violates the law, and entertains the criminal design to violate it, is to be excused of his crime because same was induced by the act of an officer of the law, it goes too far and we cannot follow it.

Many opinions, which we shall not take the time to analyze, deal with the subject of entrapment as though the enforcement of the law were a game in which the law is to be penalized because officials do not play according

to the rules. Others confound the law with the personality of the officials who enforce it and, in cases where the criminal design is said to have originated in the mind of the officer rather than in the mind of the accused, apply a false doctrine of entrapment based in some decisions on estoppel, in others on shadowy grounds of public policy. Neither ground will withstand analysis.

So far as estoppel is concerned, it must be remembered that our government is one of laws and not of men. Officials of the government cannot by word or conduct set aside the law or authorize its violation. If an officer in an excess of zeal engages in unethical conduct, he is subject to censure or removal from office. If he violates the law, he is subject to punishment. But no conduct on his part justifies the violation of law by anyone else. It is well settled that in civil matters the government is not estopped by the acts of its officers "in entering into an arrangement or agreement to do or cause to be done what the law does [fol. 40] not sanction or permit." Utah Power & Light Co. v. U. S. 243 U. S. 389, 409; State of Utah v. U. S. — U. S. —, 52 Sup. Ct. Rep. 232. A fortiori no estoppel exists in criminal cases. Upon no logical basis can the government, which represents the whole people, be held to be estopped from prosecuting one who has violated a law enacted for the protection of society; nor can justification be found for allowing one who has knowingly violated such a law to go unwhipped of justice because his action has resulted from temptation by a government official. As was said by the Court of Appeals of New York in People v. Mills 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131:

"While the courts neither adopt nor approve the action of the officers, which they hold was unauthorized, still they should not hesitate to punish the crime actually committed by the defendant. It is their duty to protect the innocent and punish the guilty. We are asked to protect the defendant, not because he is innocent, but because a zealous public officer exceeded his powers, and held out a bait. The courts do not look to see who held out the bait, but to see who took it."

As to public policy, there is no higher public policy than that all men should obey the law. It is true that it is not the

duty of officers "to incite to and create crime for the sole purpose of prosecuting and punishing it." But this is a matter which is to be considered when dealing with the officer, not one behind which a person who has intentionally violated the law may shield himself. When Congress in the exercise of the power conferred upon it by the people forbids certain conduct as criminal, he who violates the law so enacted is guilty of crime whatever the nature or source of his temptation to violate it; and it is not for the courts to say that crime thus committed is not crime because induced by improper conduct of government officials. Two wrongs do not make a right; and no public policy requires that the courts so declare.

[fol. 41] Congress has the power to declare what acts shall constitute crime. It has the power, also, to provide, if it sees fit to do so, that persons shall not be deemed guilty of crime if led into the commission of criminal acts by officers of the government. But in the absence of such provision, the courts have no power to grant immunity to such persons. For them to do so, is to usurp to that extent the pardoning power, which under our form of government is vested in the executive. This is in no sense a holding that the government or its officers can do no wrong. It is but the application of the salutary doctrine that the officers are not the government and that one who violates the law is not to be excused of his crime because of the wrongful conduct of others.

While the case at bar is one involving the violation of the liquor laws, the rule which we are asked to approve would not apply in liquor cases alone, but would furnish a haven of refuge to criminals generally. Most of the criminal laws enacted by the federal government denounce acts which are directed not against particular individuals but against the well being of the social order. For the detection and punishment of such crimes, the government must rely, not upon the voluntary action of aggrieved individuals, but upon the diligence of its officials whose duty it is to detect crime. One of the methods frequently used to detect violations of the postal laws, the anti-narcotic laws, the revenue laws, laws for the protection of the currency and many others, is to furnish to suspected violators an opportunity to violate them. In almost every case where such method succeeds the design to commit the par-

ticular act for which the accused is prosecuted is said to have arisen in the mind of the officer, and the accused claims that he has been entrapped. It is suggested that the plea should be sustained unless the officer can satisfy the jury that he had ground to suspect that the accused was guilty at the time that he furnished the opportunity; but, as stated above, to accept such suggestion would mean [fol. 42] that the trial would be diverted from an inquiry into the guilt of the accused into an inquiry into the information, motives and suspicions of the officer. These, we think, have nothing to do with the case; and it would be most unfortunate for any such practice to be engrafted on the law.

When society is grappling with organized crime, no public policy requires that the courts weaken the hands of the government by recognizing a defense for criminals which has not been created by statute and did not exist at common law, or that they impair the efficiency of trial procedure by allowing persons on trial for crime to inject as an issue to be tried by the jury the reasonableness of the suspicions of an officer when he laid a trap for their apprehension. It is time to get back to fundamentals. The law is supreme. No man may violate it with impunity. Government officials are not above the law; and nothing that they do excuses the violation of the law by anyone else. Courts should protect the innocent, but when a man knowingly and intentionally violates the law he is no longer innocent, whatever the source of his temptation.

If officers of the government have been guilty of unethical conduct in obtaining evidence against an accused, this is a matter which the jury may consider in passing upon their credibility. If the accused has not therefore been engaged in the commission of crime and has been induced by the officers to violate a law which he would not otherwise have violated, this is a matter which the judge can and should consider in inflicting punishment. But none of these matters exonerates one who has knowingly and intentionally violated the law of his country. No estoppel stays the hand of the government from prosecuting such violation; and no public policy grants amnesty to the violator.

There is no analogy between the rule here under consideration and that which forbids the use on the trial of [fol. 43] evidence obtained by a search in violation of the

4th and 5th Amendments to the Constitution. These amendments forbid the use of governmental force to search a man's home, his person, his papers or his effects. Paper v. U. S. (C. C. A. 4th) 53 Fed. (2d) 184; and evidence obtained in violation of the amendments is not admissible for the reason that to admit it would nullify the constitutional rights of the accused. Henderson v. U. S. (C. C. A. 4th) 12 Fed. (2d) 528; Agnello v. U. S. 269 U. S. 20. Here there is no contention that any constitutional right of the accused has been violated; and the question is, not as to the admissibility of evidence, but as to the validity of an asserted defense to crime.

Little need be said as to the admissibility of the evidence as to which exception was taken. Assuming without deciding that it was not admissible (but see Sauvain v. U. S. (C. C. A. 8th) 31 Fed. (2d) 732, and Billingsley v. U. S. (C. C. A. 6th) 274 Fed. 86), its admission could not have prejudiced defendant's cause for the reason that the evidence both of the government and of the defense showed without question that defendant made the sale of which he was convicted, and the only question which defendant raised with regard thereto was as to entrapment. In such case evidence of a subsequent sale could not by any possibility have effected the result.

For the reasons stated, the judgment of the court below will be affirmed.

Affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION

SOPER, Circuit Judge, dissenting:

The opinion of the court announces a rule of law contrary to that stated in its former decision in Newman vs. United States, 299 Fed. 128, in which it was held that under certain circumstances, entrapment of a defendant by government officials constitutes a valid defense. In that case Judge Woods said:

[fol. 44] "It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permis-

sible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor. The first duties of the officers of the law are to prevent, not to punish, crime. 'It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it.' Butts vs. United States (C. C. A.) 273 Fed. 35."

Judge Sanborn's comprehensive statement to the same effect in Butts vs. United States, supra, has been widely quoted with approval; and the doctrine has been accepted in every federal circuit.[1] The Supreme Court of the United States has had no occasion to say in any case before it that the accused had been improperly entrapped. The facts in each instance have shown merely a purpose on the part of the government's agents to ascertain whether the defendant was engaged in an unlawful business and not a design to induce or solicit the commission of a crime.[2] It

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[1] United States vs. Certain Quantities of Intoxicating Liquors (D. C. N. H.) 290 F. 824; Capuano vs. United States, (C. C. A. 1st) 9 F. (2d) 41; Lucadamo vs. United States, (C. C. A. 2nd) 280 F. 653; United States vs. Reisenweber, (C. C. A. 2nd) 288 Fed. 520; United States vs. Lynch, (D. C. N. Y.) 256 F. 983; Zucker vs. United States (C. C. A. 3rd) 288 F. 12; Newman vs. United States, (C. C. A. 4th) 299 F. 128; Vamas vs. United States, (C. C. A. 5th) 13 F. (2d) 347; Billingsley vs. United States, (C. C. A. 6th) 274 Fed. 86; Cermak vs. United States, (C. C. A. 6th) 4 F. (2d) 99; O'Brien vs. United States, (C. C. A. 7th) 51 F. (2d) 674; Butts vs. United States, (C. C. A. 8th) 273 F. 35; 18 A. L. R. 143-note; Robinson vs. United States, (C. C. A. 8th) 32 F. (2d) 505; 66 A. L. R. 468-note; Peterson vs. United States, (C. C. A. 9th) 255 F. 433; See Cornelius on Search and Seizure, Sec. 75 et seq.

[2] Grimm vs. United States, 156 U. S. 604; Goode vs. United States, 159 U. S. 667; Rosen vs. United States, 161 U. S. 29; Andrews vs. United States, 162 U. S. 420, 423; Price vs. United States, 165 U. S. 311.

has been sufficient for the court to point out that the in-
[fol. 45] vestigations of the agents had been conducted in a proper manner, and no decision has been based on the theory now advanced that the defense cannot exist in any case, if all of the elements of a crime are present. In its most recent decision on the question, Casey vs. United States 276 U. S. 419, the court held that a defense of entrapment should be overruled, and a conviction for violation of the narcotic laws should be sustained, because the government officers, who got the evidence with the aid of a decoy, had probable cause to suspect that the defendant wa a habitual violator, and did nothing to induce him to commit the crime beyond a simple request to furnish the drugs contrary to law. The Supreme Court has gone no further than to hold, in harmony with the widely accepted rule, that entrapment is no defense when the officers of the government merely present an opportunity to a suspected person to violate the law.

It is of course true that no conduct on the part of the officers of the government can authorize or excuse a violation of the law. Nevertheless, it has been thought by the federal judiciary with striking unanimity that the government should not be allowed to prosecute a man who has been transformed from a law abiding citizen into a criminal by the activities of its agents. It is agreed that there is no place in our system of law for the idea that the government can do no wrong. Langford vs. United States, 101 U. S. 341. Such a prosecution is rarely undertaken, as those who have had experience in the federal courts well know; most frequently the defense of improper entrapment is merely a groundless excuse offered by those who would escape the penalty of their offenses. But when the defense is sustained by the proof, fair dealing demands that the prosecution shall fail.

We do not satisfy this ideal by an appeal to the doctrine
[fol. 46] that in civil affairs, the government is not estopped by the unlawful acts or neglects of its agents. That rule is designed to relieve the government from responsibility for the unauthorized acts and delinquencies of persons in its employ. Judge Story, in a case of laches, said that the rule was based not upon the notion of extraordinary prerogative, but upon a great public policy. United States vs. Kirkpatrick, 9 Wheat. 720, 735; United States vs. Hoar,

2 Mason, 311. See also United States vs. Whiteside, 93 U. S. 247, 257. The manifold operations of the government can be conducted only through numerous agents. One who deals with them is obliged to take notice of the limitations upon their powers, and may not assert any claim or defense based upon either laches or neglect; for otherwise, the most serious losses to the public could not be avoided with the utmost vigilance. So understood, the doctrine seems to furnish little reason to permit the government to adopt and ratify conduct on the part of its agents, which no one undertakes to justify. It is likely enough that the rule of entrapment now generally accepted in other federal circuits is an extension of the law laid down in those cases like larceny, in which the consent of the injured party is inconsistent with the existence of the crime; but the development, illogical though it may have been, has taken place, and we should gain nothing if we should now retrace our steps. "The life of the law has not been logic; it has been experience." Holmes, The Common Law, 1.

The facts in the pending case justify an application of the prevailing rule. Sorrells was regularly employed by the Champion Fibre Company at Canton, North Carolina, and had not missed a pay day since March, 1924. On Sunday, July 13, 1930, a prohibition agent visited Sorrells' home in the country near the village of Clyde, North Carolina, in order to try to buy intoxicating liquors from him, and if successful, to prosecute him for violation of the National Prohibition law. The agent was accompanied by [fol. 47] three young men, residents of the community. One of them introduced him to Sorrells as a furniture dealer from Charlotte, on a vacation, who was desirous of procuring some good whisky. The agent asked Sorrells to get it; but he said that he did not have any whisky and that he did not fool with it. The agent and his associates nevertheless remained at the house for an hour and a half, and during this interval, it transpired that Sorrells and the agent and one of the others had served in the same division of the American Army during the Great War. Their experiences in the war were discussed; and during the conversation, the agent asked Sorrells three or four times to get some whisky, but each time was met with the same response as at first. The request was again renewed,

and finally Sorrells said that he would go and see if he could get some. He left his home and was gone from twenty to thirty minutes, returning with a half gallon of whisky which he delivered to the agent in exchange for the sum of five dollars. There was evidence tending to show that Sorrells bore a good reputation in the community. To offset this testimony, the government called a number of witnesses in rebuttal who said that for a considerable period prior to the sale, Sorrells had the general reputation of being a rum-runner, and that this reputation was known to the agent. The government also proved that Sorrells made a subsequent sale of intoxicating liquor on August 28, 1930, when solicited by the prohibition agent, and also that a search of the defendant's premises two weeks later revealed eleven one-half gallon jars of whisky hidden in a thicket seventy-five yards from the defendant's house and a ten gallon keg containing three and a half gallons of wine secreted near his residence.

From this evidence, the jury might have found that the defendant had been an industrious law abiding man, who had never violated the National Prohibition law prior to [fol. 48] the sale charged in the indictment; and that he was over persuaded on that occasion by the persistent requests of his former comrades in arms to leave his home and procure the liquor they desired. On the other hand, the jury might have concluded that the agent had reason to suspect that the defendant was a law-breaker, and that the event proved this to be true when once the defendant was convinced that he might safely do business with his visitors. The District Judge refused to submit the issue thus raised and charged the jury that the evidence showed that the defendant was not induced or entrapped to sell the liquor, and that if the jury believed that the sale was made, they should find a verdict of guilty. The defendant was convicted and sentenced to serve a term of eighteen months in the penitentiary. It was not a case for peremptory instructions by the District Judge either way, if improper entrapment is a valid defense, for conflicting inferences might reasonably have been drawn from the evidence, and a question of fact for the determination of the jury was presented. Chicago & N. W. Ry. Co. vs. United States, 234 F. 272; Western Union Tel. Co. vs. Hall, 287 F. 297.

[fol. 49] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3168

C. V. SORRELLS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Western District of North Carolina

JUDGMENT—Filed and Entered April 15, 1932

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby affirmed.

John J. Parker, Senior Circuit Judge.

April 15, 1932.

MEMORANDUM AS TO MANDATE

On another day, to-wit, April 26, 1932, the mandate of this Court, in this cause, is issued and transmitted to the [fol. 50] United States District Court at Asheville, North Carolina, in due form.

Same day, the original petition for appeal, order allowing appeal, and bond are returned to the Clerk of the District Court at Asheville, North Carolina.

Clerk's certificate to foregoing transcript omitted in printing.

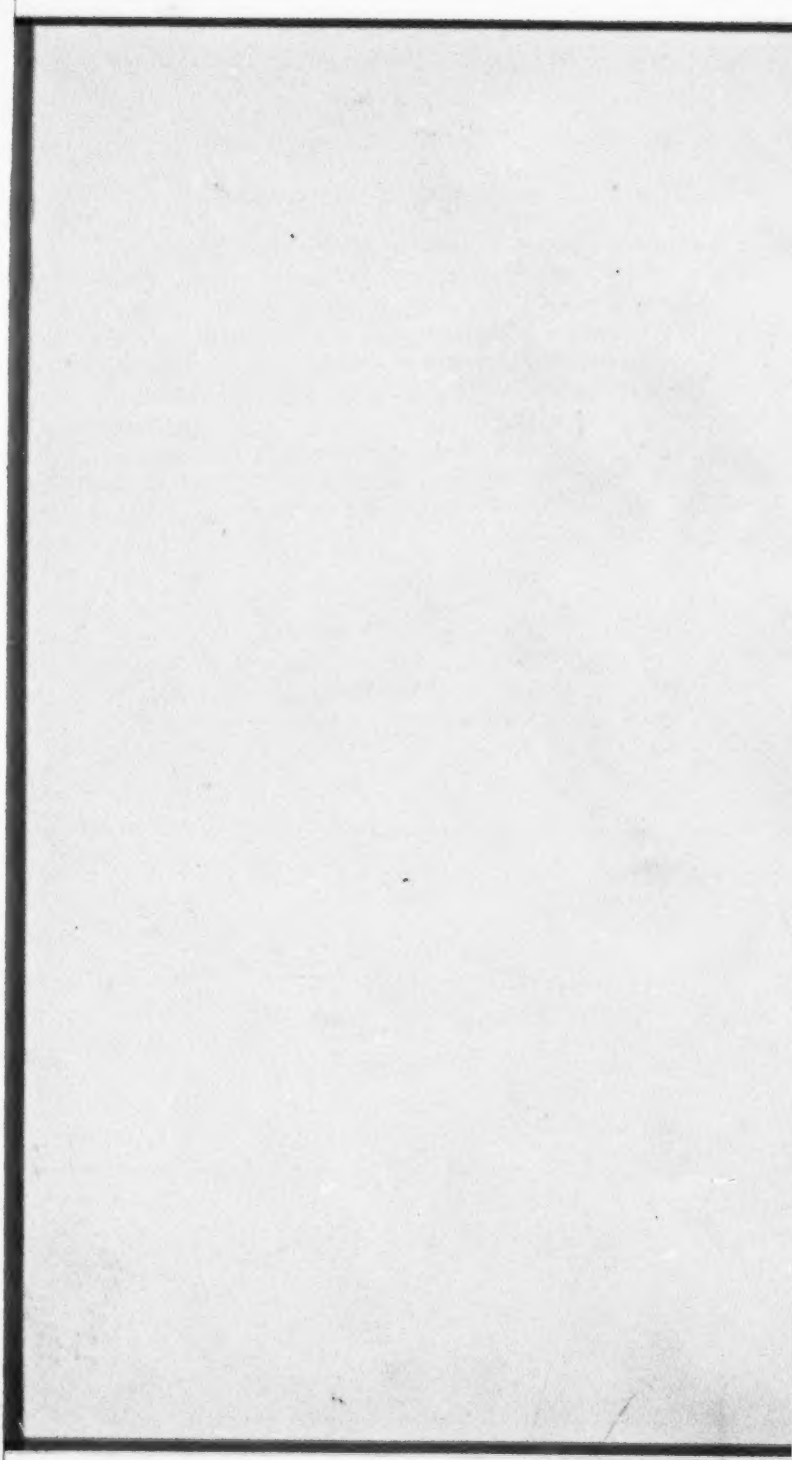
[fol. 51] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, limited to the question whether the evidence was sufficient to go to the jury upon the issue of entrapment. The case is advanced and assigned for argument on Monday, November 7th next after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,874. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 177. C. V. Sorrells, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed June 27, 1932. File No. 36,874.



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FILED
JUN 27 1932
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 177

C. V. SORRELLS, PETITIONER,

against

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

A. HALL JOHNSTON,
Counsel for the Petitioner.

JOHN Y. JORDAN, JR.,
Of Counsel.

(36,874)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 177

C. V. SORRELLS, PETITIONER,

against

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, C. V. Sorrells, by A. Hall Johnston, his counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above entitled case on April 15th, 1932, affirming the decision of the United States District Court for the Western District of North Carolina (at Asheville).

Question Presented.

May similar acts or conduct of an accused committed subsequently to the act charged in the bill of indictment be introduced in evidence against him?

Does entrapment, when relied upon by an accused and properly shown by the evidence constitute a valid defense to a criminal prosecution?

Where the evidence presents a question of fact for the jury upon the issue of entrapment, should such issue be submitted to the jury under proper instructions?

Statutes Involved.

National Prohibition Act, as amended January 15, 1931, Chapter 29, 46 Stat. 1036; 27 U. S. C. A., Sec. 91:

> "Wherever a penalty or penalties are prescribed in a criminal prosecution by this title, for the illegal manufacture, sale, transportation, importation, or exportation of intoxicating liquor, as defined by section 4 of this title, the penalty imposed for each such offense shall be a fine not to exceed $10,000 or imprisonment not to exceed five years, or both: *Provided,* That any person who violates the provisions of this title, in any of the following ways: (1) by a sale of not more than one gallon of liquor as that word is defined by section 4 of this title: *Provided, however,* That the defendant has not theretofore within two years been convicted of a violation of this title or is not engaged in habitual violation of the same; (2) by unlawful making of liquor, as that word is defined by said section, in an amount not exceeding one gallon, in the

production of which no other person is employed; (3) by assisting in unlawfully making or unlawfully transporting of liquor, as above defined, as a casual employee only; (4) by unlawfully transporting not exceeding one gallon of liquor, as above defined, by a person not habitually engaged or employed in, or not theretofore within two years having been convicted of a violation of such law, shall for each offense be subject to a fine of not to exceed $500 or to be confined in jail, without hard labor, not to exceed six months, or both."

Statement.

The facts are succinctly stated in the dissenting opinion of the Circuit Court of Appeals (R. 16-17) as follows:

> "The defendant, Sorrells was regularly employed by the Champion Fibre Company at Canton, North Carolina, and had not missed a pay day since March, 1924. On Sunday, July 13, 1930, a prohibition agent visited Sorrells' home in the country near the village of Clyde, North Carolina, in order to try to buy intoxicating liquors from him, and if successful, to prosecute him for violation of the National Prohibition law. The agent was accompanied by three young men, residents of the community. One of them introduced him to Sorrells as a furniture dealer from Charlotte, on a vacation, who was desirous of procuring some good whiskey. The agent asked Sorrells to get it; but he said that he did not have any whisky and that he did not fool with it. The agent and his associates nevertheless remained at the house for an hour and a

half, and during this interval it transpired that Sorrels and the agent and one of the others had served in the same division of the American Army during the Great War. Their experiences in the war were discussed; and during the conversation, the agent asked Sorrells three or four times to get some whisky, but each time was met with the same response as at first. The request was again renewed, and finally Sorrells said that he would go and see if he could get some. He left his home and was gone from twenty to thirty minutes, returning with a half gallon of whisky which he delivered to the agent in exchange for the sum of five dollars. There was evidence tending to show that Sorrells bore a good reputation in the community. To offset this testimony, the Government called a number of witnesses in rebuttal who said that for a considerable period prior to the sale, Sorrells had the general reputation of being a rum-runner, and that this reputation was known to the agent. The Government also proved that Sorrells made a subsequent sale of intoxicating liquor on August 28, 1930, when solicited by the prohibition agent, and also that a search of the defendant's premises two weeks later revealed eleven one-half gallon jars of whisky hidden in a thicket seventy-five yards from the defendant's house and a ten gallon keg containing three and a half gallons of wine secreted near his residence."

Upon the trial of the action upon the resting of its case by the Government, the defendant moved the Court for a directed verdict of not guilty. The motion was overruled and the defendant then and there duly objected and excepted. Upon the conclusion of all the

evidence the defendant renewed his motion for a directed verdict of not guilty, which said motion was overruled and the defendant then and there duly objected and excepted. The defendant in apt time tendered the Court written request for instructions which request was denied and the defendant then and there duly objected and excepted. The trial court charged the jury that as a matter of law no issue of entrapment had been presented and the jury should return a verdict of guilty. Upon the returning of the verdict by the jury, the defendant was sentenced to eighteen months in the United States Penitentiary at Atlanta, Georgia, following which the defendant duly appealed to the Circuit Court of Appeals.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred in affirming the decision of the District Court in that;

1. The Court erred in its failure to find that from the evidence adduced at the trial, a clear case of entrapment was shown, thereby entitling the defendant to a directed verdict of not guilty; and

2. The Court erred in its failure to find that the issue of entrapment should have been presented to the jury under proper instructions; and

3. The Court erred in its failure to find that the evidence of similar acts committed subsequent to the offense charged in the bill of indictment were inadmissible and prejudicial to the rights of the defendant.

Reasons for Granting the Writ.

1. The question involved is one of great public importance and vitally affects the Government in its administration of the National Prohibition Act. United States attorneys and district judges in the various districts are not agreed upon an interpretation of the law herein involved and consequently the procedure and decisions in the various districts is neither uniform nor consistent.

2. The opinion of the Circuit Court of Appeals in this case announces a rule of law contrary to that stated in its former decision in *Newman* v. *United States,* 299 Fed. 128, and the opinion of the Circuit Court in this case is in conflict and at variance with the holdings of the Circuit Court of Appeals in the Ninth Circuit (*Peterson* v. *United States,* 255 Fed. 433); the Eighth Circuit (*Butts* v. *United States,* 273 Fed. 35); and the Seventh Circuit (*O'Brian* v. *United States,* 51 Fed. (2) 674.

3. A final determination by this Court will clarify the law since the various circuit courts have reached diverse conclusions on these issues.

4. The case presents clearly for the consideration of this Court an issue which does not come within the circumstances and principles of law as set forth in the opinion of this Court in the recent case of *Casey* v. *United States,* 276 U. S. 413.

5. Many cases in which these questions are at issue are pending in the Federal courts.

WHEREFORE it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit should be granted.

C. V. SORRELLS,
By A. HALL JOHNSTON,
Counsel for the Petitioner.

JOHN Y. JORDAN, JR.,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

No written opinion was filed by the United States District Court for the Western District of North Carolina. The opinion of the Circuit Court of Appeals for the Fourth Circuit affirming the judgment of the District Court is reported in 57 Fed. (2d) 973 (R. 31).

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Fourth Circuit was entered April 15, 1932 (R. 49). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code (as amended), 28 U. S. C. A., Sec. 347.

Statement.

A statement of facts and of the errors relied on will be found in the Petition.

ARGUMENT.

First Proposition.

The admissibility of the testimony of the Government's witnesses, White and Martin as to the *subsequent* transactions with the defendant.

In making out its case the Government was allowed to show against the defendant's objection that an alleged sale was made by the defendant approximately a month after the alleged commission of the offense for which the defendant was on trial.

It is a familiar and long established rule that similar acts or misdeeds of the accused are inadmissible against him except where they are material in proof of some necessary element of the offense for which he is on trial. This rule is laid down by all the text writers and in numberless decisions. An exception is found in cases where the criminality of the act depends upon the intent of the accused, and the wrongful intent must therefore be established. In such cases evidence may be given of *prior* misconduct of like character for the purpose of proving the intent with which the particular act was committed."

Day v. *United States*, 220 Fed. 818 (at 819) (4th Cir.); *Carpenter* v. *United States*, 280 Fed. 598 (at 600) (4th Cir.); *Newman* v. *United States*, 289 Fed. 712 (at 716) (4th Cir.); *Lynch et al.*, v. *United States*, 12 Fed. (2) 193 (at 194) (4th Cir.).

Second Proposition.

The Court should have directed a verdict in favor of the defendant upon the resting by the Government of its case.

It is seriously and earnestly contended that the evidence introduced by the Government against the defendant clearly showed entrapment. The Prohibition Agent, Martin, who purchased the whiskey, admitted on cross examination that he was the first and only person to mention the question of securing liquor and that he asked and begged the defendant two or three times to procure the liquor. The witness testified that

the defendant stated he did not have any whiskey and that he did not fool with it and that it was only after considerable conversation and repeated urging on the part of the Agent that the defendant was persuaded to go off and procure whiskey. The Agent further testified on cross examination that he went to the home of the defendant with the express purpose of endeavoring to have the defendant procure and sell him, the Agent, liquor and that if he, the Agent was successful in inducing the defendant to procure whiskey to then indict and prosecute the defendant for the commission of the offense.

The particular attention of the Court is respectfully directed to the fact that the record fails to contain a scintilla of evidence tending to show that the defendant prior to the time of the visit to his home by the Prohibition Agent was suspected of handling or selling liquor and there is not a scintilla of evidence in the record tending to show that the defendant, prior to the time of the offense alleged in the bill of indictment, had ever in any manner handled or sold liquor. The record also fails to disclose a scintilla of evidence to the effect that the Prohibition Agent suspected the defendant or had any reports concerning the defendant prior to the commission of the offense alleged in the bill of indictment.

> "Where officers of the law have incited a person to commit the crime charged and lured him on to its consummation with the purpose of arresting him in its commission the law will not authorize a verdict of guilty."
>
> "When the criminal design originates, *not with the accused*, but is conceived in the mind of

> the Government Officers and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the Government is estopped by sound public policy from prosecution therefor. The first duty of the officers of the law is to prevent, not to punish, crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it."

Peterson v. *United States,* 255 Fed. 433 (9th Cir.); *Butts* v. *United States,* 273 Fed. 35 (at 36) (8th Cir.); *Newman* v. *United States,* 299 Fed. 126 (at 131) (4th Cir.); *Silk* v. *United States,* 16 Fed. (2) 568 (8th Cir.); Annotations and Note in 18 A. L. R. 143 at 149 and 164. *O'Brien* v. *United States,* 51 Fed. (2) 674.

Third Proposition.

That the Court should, at the conclusion of all the testimony, have directed a verdict of not guilty.

The testimony offered by the defendant showed conclusively that he was persuaded and induced by the Prohibition Agent to procure the liquor and that the defendant did so only after repeated requests and solicitations by the Agent. The defendant's testimony further showed that the Agent was the first and only person who brought up the subject of whiskey and that nothing was said about whiskey, nor were there any indications that the defendant had any desire, opportunity or facilities for the procuring of any whiskey.

The testimony offered by the defendant showed that he was a regular employee of the Champion Fiber Company of Canton, North Carolina, and that he had

been regularly employed by such Company from March, 1924, continuously to the time of his trial, and the record discloses the fact that the defendant had not missed a single pay roll during such period of time.

Again the particular attention of the Court is respectfully directed to the fact that the entire testimony in the record, including the rebuttal testimony of the Government, fails to show a scintilla of evidence to the effect that *prior* to the commission of the alleged offense the defendant had any reputation as a liquor dealer or that he was suspected of handling liquor, *or that prior* to the alleged offense the Prohibition Agent suspected the defendant or had any report as to the defendant handling liquor.

The defendant respectfully insists that at the conclusion of all the evidence a clear case of entrapment was made out and that a verdict should have been directed in his favor.

Peterson v. *United States,* 255 Fed. 433 (9th Cir.); *Butts* v. *United States,* 273 Fed. 35 (at 36) (8th Cir.); *Newman* v. *United States,* 299 Fed. 126 (at 131) (4th Cir.); *Silk* v. *United States,* 16 Fed. (2) 568 (8th Cir.).

Fourth Proposition.

That the Court should have given as a part of its charge to the jury the written request for instructions, which defendant, in apt time, tendered, and which appear in the record herein.

The defendant respectfully insists that the question of entrapment is a question of fact to be determined

by the jury and not a question of law to be decided by the Court and that wherever entrapment is offered as a defense the question should, under proper instructions, be submitted to the jury.

> "In a criminal prosecution where the defense was that the defendant was incited and induced to commit the offense by officers for the purpose of entrapment the refusal of instructions submitting that question to the jury as one of fact and the giving of instructions treating it as one of law and charging that it presented no defense was error."

Peterson v. *United States,* 255 Fed. 433 (9th Cir.); *Butts* v. *United States,* 273 Fed. 35 (at 38) (8th Cir.).

> "When in a criminal prosecution the question of entrapment arises the defendant is entitled to an accurate statement of the law of entrapment. The jury should be instructed as to what in law constitutes entrapment and it is then a question of fact to be determined by the jury under such instructions as to whether or not there was an entrapment."

Newman v. *United States,* 299 Fed. 126 (at 131) (4th Cir.).

> "Where the evidence presents a question of fact for the jury upon the issue of entrapment such issue should be submitted to the jury under proper instructions."

Silk v. *United States,* 16 Fed. (2) 568 (at 570) (8th Cir.).

> "Where the evidence on the question of entrapment is in conflict it presents an issue of

> fact for the jury on proper instructions and it is not within the province of the Court to decide it. If it be made out by the proof to the satisfaction of the jury it constitutes a complete defense to the charge."

Jarl v. *United States*, 19 Fed. (2) 891 (at 896) (8th Cir.).

Fifth Proposition.

The Court erred in its charge to the jury when it charged them as follows:

> "Gentlemen of the jury, the defendant's counsel takes the position that this man was induced or entrapped to sell liquor. The Court holds as a matter of law that was not the case and the Court instructs that if you believe the testimony of Mr. Martin, the witness who said he bought a half gallon from the defendant, you will convict him then. You will take the case and go out with it or you can form your opinion here."

Peterson v. *United States*, 255 Fed. 433 (9th Cir.); *Butts* v. *United States*, 273 Fed. 35 (at 38) (8th Cir.); *Newman* v. *United States*, 299 Fed. 126 (at 131) (4th Cir.); *Silk* v. *United States*, 16 Fed. (2) (at 570) (8th Cir.); *Jarl* v. *United States*, 19 Fed. (2) 891 (at 896) (8th Cir.).

PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED SO THAT THE ISSUE PRESENTED MAY BE FINALLY DETERMINED.

The petition herein points out that the Circuit Court decision in this case is at variance with the holding of

the same Court in the previous case of *Newman* v. *United States*, 299 Fed. 128, and the petition further points out that the Circuit Court decision in this case is at variance with the holdings of the Circuit Courts of Appeals for the Seventh, Eighth and Ninth Circuits.

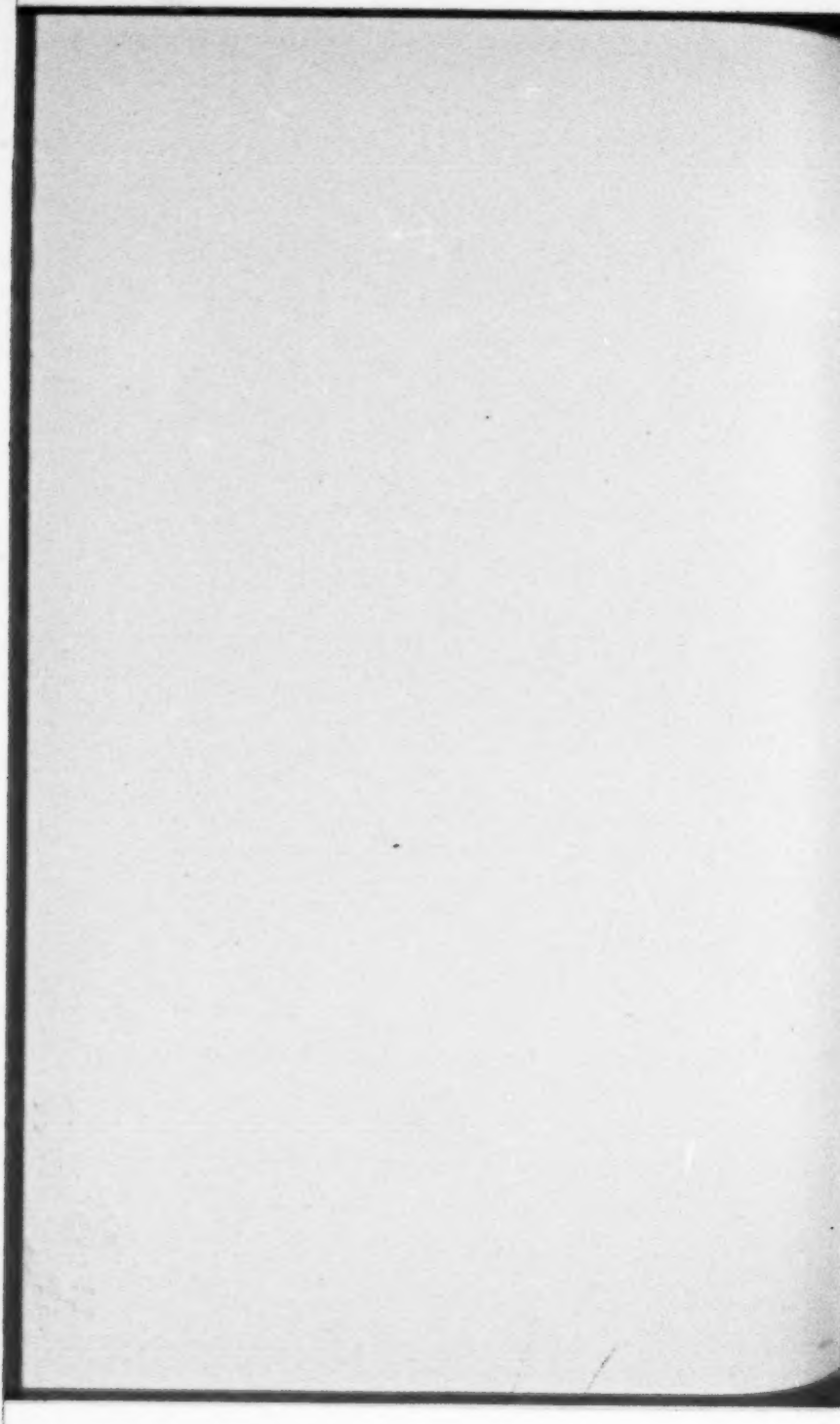
Not only is it true that the decision rendered by the Circuit Court in this case is at variance with Circuit Courts of other Circuits, but the majority opinion of the Circuit Court in this case is at variance with and contrary to the decisions of the Supreme Court of the United States in the various cases decided by such Court as pointed out by Circuit Judge Soper in his dissenting opinion in this case.

CONCLUSION.

It is respectfully submitted that the issues in this case raised by the record herein will clearly present to the Court the fact that the majority opinion of the Circuit Court of Appeals for the Fourth Circuit was erroneous and contrary to the overwhelming majority of judicial opinions as rendered by the various Circuit Courts of Appeals of the United States and this Court.

JOHN Y. JORDAN, JR.,
Of Counsel.

A. HALL JOHNSTON,
Counsel for the Petitioner.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 177

C. V. SORRELLS, PETITIONER,

against

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

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Asheville, North Carolina,
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Of Counsel.

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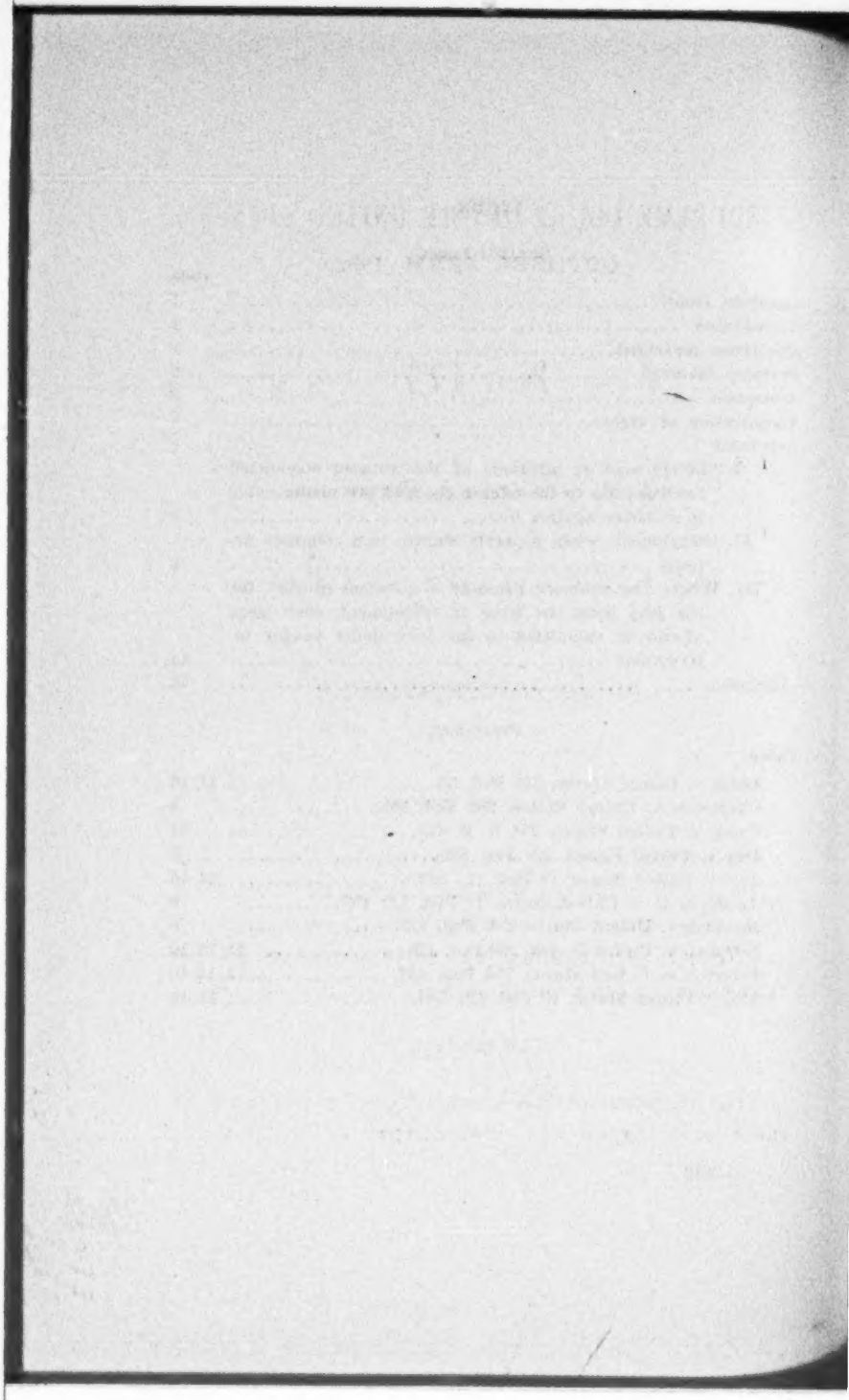

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 177

C. V. SORRELLS, PETITIONER,

against

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

Opinions Below.

No written opinion was filed by the United States District Court for the Western District of North Carolina. The opinion of the Circuit Court of Appeals for the Fourth Circuit affirming the judgment of the District Court is reported in 57 Fed. (2d) 973 (R. 26).

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Fourth Circuit was entered April 15, 1932 (R. 41).

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code (as amended), 28 U. S. C. A., Sec. 347.

Questions Presented.

May similar acts or conduct of an accused committed subsequently to the act charged in the bill of indictment be introduced in evidence against him?

Does entrapment, when relied upon by an accused and properly shown by the evidence, constitute a valid defense to a criminal prosecution?

Where the evidence presents a question of fact for the jury upon the issue of entrapment, should such issue be submitted to the jury under proper instructions?

Statutes Involved.

National Prohibition Act, as amended January 15, 1931, Chapter 29, 46 Stat. 1036; 27 U. S. C. A., Sec. 91:

> "Wherever a penalty or penalties are prescribed in a criminal prosecution by this title, for the illegal manufacture, sale, transportation, importation, or exportation of intoxicating liquor, as defined by section 4 of this title, the penalty imposed for each such offense shall be a fine not to exceed $10,000 or imprisonment not to exceed five years, or both: *Provided,* That any person who violates the provisions of this title, in any of the following ways: (1) by a sale of not more than one gallon of liquor as that word is defined by section 4 of this title: *Provided, however,* That the defendant has not

theretofore within two years been convicted of a violation of this title or is not engaged in habitual violation of the same; (2) by unlawful making of liquor, as that word is defined by said section, in an amount not exceeding one gallon, in the production of which no other person is employed; (3) by assisting in unlawfully making or unlawfully transporting of liquor, as above defined, as a casual employee only; (4) by unlawfully transporting not exceeding one gallon of liquor, as above defined, by a person not habitually engaged or employed in, or not theretofore within two years having been convicted of a violation of such law, shall for each offense be subject to a fine of not to exceed $500 or to be confined in jail, without hard labor, not to exceed six months, or both."

Statement.

Petitioner, who was the defendant in the court below, and who will hereafter be referred to as the defendant, was convicted of violating the National Prohibition Act, in that he was charged with the sale on July 13, 1930, of one-half gallon of liquor to one, R. V. Martin, a Federal Prohibition Agent.

The Bill of Indictment contained two counts, the first alleging that the defendant, on the 13th day of July, 1930, possessed a large quantity of liquor, to-wit: one-half gallon, and the second count alleged that the defendant, on the 13th day of July, 1930, did unlawfully and feloniously sell to one, R. V. Martin, a large quantity of intoxicating liquor, to-wit: one-half gallon.

The first witness introduced by the Government was one, M. A. White, Prohibition Agent, who, over objection by the defendant, was permitted to testify that at a time *subsequent* to the date of the alleged sale contained in the bill of indictment, he, the said White, purchased whiskey from the defendant.

The second witness introduced by the Government was one, R. V. Martin, who testified that he was a Federal Prohibition Agent, and that on the 13th day of July, 1930, which was a Sunday, he, together with two other men, residents of Haywood County, North Carolina, visited the home of the defendant where the said Martin was introduced to the defendant as being a furniture dealer from Charlotte, North Carolina, spending a vacation in Haywood County, North Carolina, and that he was desirous of securing some whiskey. That the defendant stated he did not fool with whiskey, and, thereupon, the Prohibition Agent again asked the defendant to procure some whiskey, and that after repeating such request two or three times and after considerable conversation, it transpired that the defendant, the Prohibition Agent and one of the other men present had served in the same division of the American Army during the Great War. Their experiences in the war were discussed, and finally, after repeated urging on the part of the Prohibition Agent, the defendant said that he would go and see if he could get some whiskey. The defendant left his home and was gone from twenty to thirty minutes, returning with one-half gallon of whiskey, which he delivered to the Prohibition Agent in exchange for the sum of five dollars.

The Prohibition Agent testified that he was the first and only person among those present at the home of the defendant who said anything about securing liquor and was the first person to mention the subject. The Prohibition Agent further testified that at the time he asked the defendant to procure some liquor the Agent did so with the expressed view and purpose in mind to indict and prosecute the defendant for procuring and selling liquor, and that such was the purpose of the witness when he went to the home of the defendant and procured the liquor, and that after the Prohibition Agent procured the liquor from the defendant the Agent went before a United States Commissioner and took the proper steps to have the defendant arrested and subsequently tried for the said offense. The witness, over objection by the defendant, was permitted to testify as to the *subsequent* transaction with the defendant.

The Government then rested its case and the defendant thereupon moved the court for a directed verdict of not guilty or for a motion as of non-suit. The motion was overruled and the defendant objected and excepted and the exception was then and there allowed.

The defendant then offered testimony tending to show entrapment and introduced as witnesses in his behalf the three men who accompanied the Prohibition Agent to the home of the defendant and who testified as to the actions and conduct of the Prohibition Agent in inducing and enticing the defendant to procure the whiskey for the Agent. All the witnesses for the defendant who were present at the time of the alleged of-

fense testified in substance that the Prohibition Agent requested the defendant to procure him some liquor and that the defendant stated he did not fool with whiskey and that the Agent repeated his request three or four times and was only able to induce the defendant to procure the liquor after repeated requests and following a general conversation of something like an hour to an hour and a half in length.

The defendant offered several character witnesses who testified they had known the defendant anywhere from five years to the entire extent of the defendant's life, that they were residents of defendant's community and that his general character was good. That the defendant was an employee of the Champion Fiber Company of Canton, North Carolina, and had worked every day since March, 1924. The defendant then rested and renewed his motion for a directed verdict of not guilty or for a judgment of non-suit, which motion was then and there denied and the defendant objected and excepted and the exception was then and there allowed.

The Government, in rebuttal, again offered the witness, M. A. White, who testified, over the objection and exception of the defendant, that he purchased a half gallon of whiskey from the defendant subsequent to the offense for which the defendant was being tried, and the Government introduced certain officers who testified that the defendant's character was bad. The Government did not recall the Prohibition Agent, Martin, to the stand, and at no time during the proceeding did the Agent, Martin, ever testify that he had any suspicion of the defendant being engaged in violating the

Prohibition Law, and there was no evidence introduced on the part of the Government tending to show that the Agent, Martin, knew anything about the defendant.

At the conclusion of all the testimony the defendant again renewed his motion for a directed verdict of not guilty or for a judgment as of non-suit, which motion was denied and the defendant then and there excepted and the exception was then and there allowed.

The defendant tendered the court a written request for instructions, which were refused, and marked "not given" by the court, and the defendant objected and excepted. The court, thereupon, charged the jury that the court held as a matter of law no entrapment had been shown and that if the jury believe the testimony of the Prohibition Agent that he bought a half gallon of liquor from the defendant the jury would convict him. The defendant, following the charge by the court to the jury and before the jury retired to make up its verdict, objected and excepted to the charge of the court. The jury, thereupon, found the defendant guilty and after the usual motions were made by the defendant as appear in the record herein, the defendant was sentenced by the court to a term of eighteen months in the United States Penitentiary at Atlanta, Georgia.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred in affirming the decision of the District Court in that:

1. The court erred in its failure to find that the evidence of similar acts committed *subsequent* to the of-

fense charged in the bill of indictment were inadmissible and prejudicial to the rights of the defendant; and

2. The court erred in its failure to find that from the evidence adduced at the trial, a clear case of entrapment was shown, thereby entitling the defendant to a directed verdict of not guilty; and

3. The court erred in its failure to find that the issue of entrapment should have been presented to the jury under proper instructions.

ARGUMENT.

While there are eight assignments of errors in the record, there are but three propositions involved, which will be herewith set forth in their regular order.

First Proposition.

The admissibility of the testimony of the Government's witnesses, White and Martin, as to the *subsequent* transactions with the defendant.

In making out its case the Government was allowed to show against the defendant's objection that an alleged sale was made by the defendant approximately a month after the alleged commission of the offense for which the defendant was on trial.

> "It is a familiar and long established rule that similar acts or misdeeds of the accused are inadmissible against him except where they are material in proof of some necessary element of the offense for which he is on trial. This rule is laid down by all the text writers and in numberless decisions. An exception is found in

cases where criminality of the act depends upon the intent of the accused, and the wrongful intent must therefore be established. In such cases evidence may be given of *prior* misconduct of like character for the purpose of proving the intent with which the particular act was committed."

Day v. *United States,* 220 Fed. 818 (at 819) (4th Cir.); *Carpenter* v. *United States,* 280 Fed. 598 (at 600) (4th Cir.); *Newman* v. *United States,* 289 Fed. 712 (at 716) (4th Cir.); *Lynch et al.* v. *United States,* 12 Fed. (2) 193 (at 194) (4th Cir.).

Second Proposition.

The court should have directed a verdict in favor of the defendant upon the resting by the Government of its case.

It is seriously and earnestly contended that the evidence introduced by the Government against the defendant clearly showed entrapment. The Prohibition Agent, Martin, who purchased the whiskey, admitted on cross examination that he was the first and only person to mention the question of securing liquor and that he asked and begged the defendant two or three times to procure the liquor. The witness testified that the defendant stated he did not have any whiskey and that he did not fool with it and that it was only after considerable conversation and repeated urging on the part of the Agent that the defendant was persuaded to go off and procure the whiskey. The Agent further testified on cross examination that he went to the home

of the defendant with the express purpose of endeavoring to have the defendant procure and sell him, the Agent, liquor and that if he, the Agent, was successful in inducing the defendant to procure whiskey to then indict and prosecute the defendant for the commission of the offense.

The particular attention of the Court is respectfully directed to the fact that the record fails to contain a scintilla of evidence tending to show that the defendant, prior to the time of the visit to his home by the Prohibition Agent, was suspected of handling or selling liquor and there is not a scintilla of evidence in the record tending to show that the defendant, prior to the time of the offense alleged in the bill of indictment, had ever in any manner handled or sold liquor. The record also fails to disclose a scintilla of evidence to the effect that the Prohibition Agent suspected the defendant or had any reports concerning the defendant prior to the commission of the offense alleged in the bill of indictment.

> "Where officers of the law have incited a person to commit the crime charged and lured him to its consummation with the purpose of arresting him in its commission the law will not authorize a verdict of guilty."
>
> "When the criminal design originates, *not with the accused,* but is conceived in the mind of the Government Officers and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the Government is estopped by sound public policy from prosecution therefor. The first duty of the officers of the law is to prevent, not to

> punish, crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it."

Peterson v. *United States,* 255 Fed. 433 (9th Cir.); *Butts* v. *United States,* 273 Fed. 35 (at 36) (8th Cir.); *Newman* v. *United States,* 299 Fed. 126 (at 131) (4th Cir.); *Silk* v. *United States,* 16 Fed. (2) 568 (8th Cir.); Annotations and Note in 18 A. L. R. 143 at 149 and 164.

It is earnestly insisted that if upon the resting by the Government of its case, the defendant was not at such time entitled to a directed verdict of not guilty, he was at the conclusion of all of the testimony entitled to such directed verdict.

The testimony offered by the defendant showed conclusively that he was persuaded and induced by the Prohibition Agent to procure the liquor and that the defendant did so only after repeated requests and solicitations by the Agent. The defendant's testimony further showed that the Agent was the first and only person who brought up the subject of whiskey and that nothing was said about whiskey, nor were there any indications that the defendant had any desire, opportunity or facilities for the procuring of any whiskey.

The testimony offered by the defendant showed that he was a regular employee of the Champion Fiber Company of Canton, North Carolina, and that he had been regularly employed by such Company from March, 1924, continuously to the time of his trial, and the record discloses the fact that the defendant

had not missed a single pay roll during such period of time.

Again the particular attention of the Court is respectfully directed to the fact that the entire testimony in the record, including the rebuttal testimony of the Government, fails to show a scintilla of evidence to the effect that *prior* to the commission of the alleged offense the defendant had any reputation as a liquor dealer or that he was suspected of handling liquor, or *that prior* to the alleged offense the Prohibition Agent suspected the defendant or had any report as to the defendant handling liquor.

In the recent case of *Casey* v. *United States,* reported in 276 U. S. 413, in which four of the Justices of this Court dissented from the majority view the question of entrapment was not raised in the trial court nor in the proceedings for review before the Circuit Court of Appeals for the Ninth Circuit, yet, nevertheless, we find that this Court upon its own volition discussed this proposition and in the majority opinion handed down by Mr. Justice Holmes, he says:

> "We do not feel at liberty to accept the suggestion that the government induced the crime. A Court rarely can act with advantage on its own motion and very rarely can be justified in giving judgment upon grounds that the record was not intended to present."

The majority opinion in the Casey case, however, then proceeds to discuss that portion of the evidence contained in the record, which might have tended to

show entrapment, and the opinion concludes with this statement:

> "Whatever doubts we may feel as to the truth of the testimony we are not at liberty to consider them on the only question before the Court. The grounds for uneasiness can be considered only by another power."

In one of the dissenting opinions in the Casey case, *supra*, Mr. Justice Brandeis said:

> "The question presented is whether possession within the District of morphine not in the original stamped package is evidence sufficient to sustain the charge that it was illegally purchased therein. I have no occasion to consider that question. *For, in my opinion, the prosecution must fail because officers of the government instigated the commission of the alleged crime.*
>
> The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the government; that the act for which the government seeks to punish the defendant is the fruit of their criminal conspiracy to induce its commission. The government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature.
>
> The fact that no objection on the ground of entrapment was taken by the defendant, either below or in this Court, is without legal significance. This prosecution should be stopped, not because some right of Casey's has been denied, but in order to protect the government. To protect it from illegal conduct of its officers.

> To preserve the purity of its Court. In my opinion the judgment should be vacated with directions to quash the indictment."

Third Proposition.

If the evidence on the question of entrapment is in conflict, it presents an issue of fact which the Court should have submitted to the jury on proper instructions.

It is respectfully contended that if the evidence on the question of entrapment is clear and uncontradicted the Court should then direct a verdict of not guilty, but, if the evidence on the question is in conflict, it thereupon presents an issue of fact for the jury on proper instructions, and it is not within the province of the Court to decide it.

It is earnestly contended that the evidence in this case as relates to entrapment is not in conflict, but on the contrary shows conclusively that the defendant was induced and persuaded to violate the law by the agent of the government, and such being so, the Court should have directed a verdict of not guilty because the necessity for submitting the question of entrapment to the jury arises only where there is a direct conflict in the testimony offered on this question.

> "Where the evidence on the question of entrapment is in conflict it presents an issue of fact for the jury on proper instructions and it is not within the province of the Court to decide it. If it be made out by the proof to the satisfaction of the jury it constitutes a complete defense to the charge."
>
> *Jarl* v. *United States,* 19 Fed. (2) 891 (at 896) (8th Cir.).

"When in a criminal prosecution the question of entrapment arises the defendant is entitled to an accurate statement of the law of entrapment. The jury should be instructed as to what in law constitutes entrapment and it is then a question of fact to be determined by the jury under such instructions as to whether or not there was an entrapment."

Newman v. *United States,* 299 Fed. 126 (at 131) (4th Cir.).

"In a criminal prosecution where the defense was that the defendant was incited and induced to commit the offense by officers for the purpose of entrapment the refusal of instructions submitting that question to the jury as one of fact and the giving of instructions treating it as one of law and charging that it presented no defense was error."

Peterson v. *United States,* 255 Fed. 433 (9th Cir.); *Butts* v. *United States,* 273 Fed. 35 (at 38) (8th Cir.).

The defendant, in apt time, presented the Court with a written request for instructions, which were refused, and the Court erred in its charge to the jury when it charged them as follows:

"Gentlemen of the jury, the defendant's counsel takes the position that this man was induced or entrapped to sell liquor. The Court holds as a matter of law that was not the case and the Court instructs that if you believe the testimony of Mr. Martin, the witness who said he bought a half gallon from the defendant, you will convict him then. You will take the case and go out with it or you can form your opinion here."

Peterson v. *United States*, 255 Fed. 433 (9th Cir.); *Butts* v. *United States*, 273 Fed. 35 (at 38) (8th Cir.); *Newman* v. *United States*, 299 Fed. 126 (at 131) (4th Cir.); *Silk* v. *United States*, 16 Fed. (2) (at 570) (8th Cir.); *Jarl* v. *United States*, 19 Fed. (2) 891 (at 896) (8th Cir.).

Conclusion.

Accordingly we have the unique situation of presenting to this Court for consideration an issue as to which several of the Justices of this Court have already expressed views sustaining the argument of the petitioner, and in addition the contention and position of petitioner has been accepted in every Federal Circuit. Petitioner's contention is supported also by logic and by dictates of fairness and justice.

It is respectfully submitted, therefore, that the decree of the United States Circuit Court of Appeals for the Fourth Circuit should be reversed.

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JOHN Y. JORDAN, JR.,
Asheville, North Carolina,
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No. 177

In the Supreme Court of the United States

OCTOBER TERM, 1932

C. V. SORRELLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. Its charge to the jury appears at R. 21–22. The majority and dissenting opinions in the Circuit Court of Appeals (R. 31–48) are reported in 57 F. (2d) 973.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 15, 1932. (R. 49.) The petition for certiorari was filed June 27, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to direct the jury to acquit petitioner upon the ground that he had been entrapped into making the sale of liquor upon which the indictment was based.

2. Whether the trial court erred in instructing the jury that the evidence did not show entrapment.

3. Whether the trial court erred in refusing to give certain requested instructions upon the subject of entrapment.

4. Whether the trial court erred in admitting in evidence, over petitioner's objection, testimony as to like offenses committed subsequent to those charged in the indictment.

STATEMENT

An indictment in two counts was returned against petitioner in the District Court for the Western District of North Carolina charging the possession and sale of one-half gallon of whisky on July 13, 1930, in violation of the National Prohibition Act. (R. 1–2.)

Petitioner's sole defense at the trial was that of entrapment. To prove the charges contained in the indictment the Government called as witnesses two Federal prohibition agents, Martin and White. The purchase upon which the indictment was based was made by Martin. He testified that on Sunday, July 13, 1930, he visited petitioner's home and "in consequence of a conversation had with the defendant the defendant went off and returned shortly

with a half-gallon of liquor for which the witness paid defendant the sum of $5.00." (R. 7.) Upon cross-examination Martin explained that this purchase was made under the following circumstances (R. 8–9):

> That he visited the home of the defendant on July 12th, 1930, at which time the defendant was not at home and that he made such trip in company with two or three young men who were residents of the community in which the witness was temporarily staying. That on Sunday afternoon, July 13th, 1930, the witness again visited the home of the defendant, accompanied by Fanning Lowe, E. D. Jones and C. J. Snyder. That upon their arrival at the home of the defendant the witness was introduced to the defendant by Fanning Lowe the witness being introduced as a resident of Charlotte, N. C., and a tourist stopping for the time being at Clyde, N. C. That the witness had a considerable conversation with the defendant, lasting between fifteen and thirty minutes and that during the conversation the witness ascertained that the defendant was a veteran of the World War and a former member of the 30th Division A. E. F. That the witness informed the defendant that he, the witness, was also an ex-service man and was also a former member of the 30th Division A. E. F., which in reality was the truth. That the witness asked the defendant if he, the defendant, could get him, the witness, some liquor and that at first the defendant

stated that he did not have any liquor. That later in the conversation the witness again asked the defendant if he, the defendant, could get him, the witness, some liquor and that there was further conversation between the two relative to the securing of some liquor. That at the time of such conversation one of those present, to-wit, E. D. Jones, was also an ex-service man and a former member of the 30th Division A. E. F. and some conversation was had between all present relative to the war experiences of the witness, the defendant and E. D. Jones. That the witness a third time asked the defendant to get him, the witness, some liquor and thereupon the defendant left his home and was gone a few minutes and came back with a half-gallon of liquor for which the witness paid the defendant the sum of $5.00. That the witness was the first and only person among those present at the time who said anything about securing some liquor and was the first person to mention the subject. That the witness at the time he asked the defendant to secure some liquor for him, the witness, did so with the express view and purpose in mind to indict and prosecute the defendant for procuring and selling the liquor and that such was the purpose of the witness when he went to the home of the defendant and procured the liquor.

Martin also testified, on direct examination, over objection, that in August he accompanied agent White to petitioner's home to purchase another

half gallon of whisky (R. 7), and White testified that petitioner sold him the whisky for $6, and said he "would guarantee it would be all right." (R. 5.) White also testified that two weeks later, in company with Martin and another man, he searched the premises around the petitioner's house and found eleven one-half gallon fruit jars full of whisky in a thicket about 100 yards below the house, and a ten-gallon keg containing between three and four gallons of wine in a field just above the house. (R. 5–6.) This search, White later testified, was made pursuant to a search warrant. (R. 17.)

Petitioner moved that the testimony of White and Martin with reference to the transactions occurring in August be stricken from the record upon the ground that they related to offenses subsequent to those charged in the indictment. This motion was overruled and petitioner noted an exception. (R. 6–7, 8.)

Among others, the petitioner called as witnesses the three men who either accompanied Martin or were present when Martin made the purchase of July 13th. (R. 9–14.) Their testimony was summarized in the dissenting opinion in the court below as follows (R. 46–47):

> The agent was accompanied by three young men, residents of the community. One of them introduced him to Sorrells as a furniture dealer from Charlotte, on a vacation, who was desirous of procuring some good

whisky. The agent asked Sorrells to get it; but he said that he did not have any whisky and that he did not fool with it. The agent and his associates nevertheless remained at the house for an hour and a half and during this interval, it transpired that Sorrells and the agent and one of the others had served in the same division of the American Army during the Great War. Their experiences in the war were discussed; and during the conversation, the agent asked Sorrells three or four times to get some whisky, but each time was met with the same response as at first. The request was again renewed, and finally Sorrells said that he would go and see if he could get some. He left his home and was gone from twenty to thirty minutes, returning with a half gallon of whisky which he delivered to the agent in exchange for the sum of $5.00.

One of these witnesses testified that he knew that petitioner had been employed by a wood fibre company at Canton, North Carolina, since 1924, and that he saw petitioner at work there practically every day. (R. 11.) This testimony was corroborated by the time-keeper and assistant paymaster of the company, who testified that petitioner had been "on his job continuously without missing a pay day since March, 1924." (R. 11–12.)

Neighbors of petitioner, who had known him for a number of years, testified that he bore a good reputation in the community. (R. 9–15.)

To rebut this testimony the Government called a number of witnesses who testified that petitioner had the general reputation of being a rum runner. (R. 17–20.) There was no direct evidence that the agent Martin had any knowledge that the petitioner had dealt in liquor prior to his first purchase from the petitioner on July 13, 1930. (R. 17.)

The record discloses no prior conviction of petitioner under the National Prohibition Act or any State liquor law.

Motions for a directed verdict were made by petitioner at appropriate intervals during the trial. These motions were denied and exceptions noted. (R. 9, 15, 20.)

Petitioner also presented certain requests for instructions on the subject of entrapment. (R. 20–21.) These were refused and an exception taken. (R. 20.) The trial judge charged the jury that as a matter of law the evidence did not show that petitioner was induced or entrapped to sell liquor. (R. 22.) Petitioner excepted to this charge (R. 22), and the jury returned a general verdict of guilty. (R. 4, 22.) After the denial of motions in arrest of judgment and to set aside the verdict, petitioner was sentenced to 18 months in the penitentiary. (R. 4, 22.)

Upon appeal to the Circuit Court of Appeals for the Fourth Circuit, the judgment of conviction was affirmed, one judge dissenting. (R. 31–49.)

DISCUSSION

We do not oppose the granting of the petition in this case. As indicated in the dissenting opinion (R. 43–48), the majority opinion narrows the doctrine of entrapment as enunciated by the court below in its earlier opinion in *Newman* v. *United States,* 299 Fed. 128, and as expressed with substantial unanimity by practically all of the other Circuit Courts of Appeals. (See list of cases collated in dissenting opinion, R. 44.) If the doctrine is correctly stated in the other Circuit Courts of Appeals, the defense of entrapment in this case raised issues which should have been submitted to the jury under appropriate instructions. From the circumstances under which the sale of July 13, 1930, was made, the finding of liquor on the premises, the subsequent sale, and the conflicting testimony as to petitioner's reputation in the community, the jury might have inferred that the defendant, being furnished an opportunity which he regarded as reasonably safe, was not unwilling to violate the law, and that he was not an innocent man induced and persuaded to commit the crime by officers of the law. But such questions, if material, were open upon this record as questions of fact.

Whichever view as to the scope of the defense of entrapment is right, the question, as stated in *O'Brien* v. *United States,* 51 F. (2d) 674, 677 (C. C. A. 7th), is "arising with ever increasing frequency in criminal cases involving prosecutions

under the National Prohibition Act." Proper enforcement of the criminal laws requires that there be no substantial divergence of views on the subject among the Circuit Courts of Appeals. The question of entrapment involves important considerations of public policy which affect the Government and its citizens, and we believe that the questions presented in this case are of sufficient general importance to justify review by this Court. The subject was last dealt with by this Court in *Casey* v. *United States*, 276 U. S. 413, but the majority opinion points out that the record in that case was not particularly designed to present the question, and the Court did not lay down a rule in that case which has been regarded by the Circuit Courts of Appeals as establishing the limits of the defense of entrapment.

Respectfully submitted.

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No. 177

In the Supreme Court of the United States

OCTOBER TERM, 1932

C. V. SORRELLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. Its charge to the jury appears at R. 19. The majority and dissenting opinions in the Circuit Court of Appeals (R. 26–40) are reported in 57 F. (2d) 973.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 15, 1932. (R. 41.) The petition for certiorari was filed June 27, 1932, and was granted October 10, 1932, limited "to the question whether the evidence was sufficient to go to the jury

upon the issue of entrapment." (R. 42.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the evidence in the case was sufficient to go to the jury upon the issue of entrapment.

STATEMENT

An indictment in two counts was returned against petitioner in the District Court for the Western District of North Carolina charging the possession and sale of one-half gallon of whisky on July 13, 1930, in violation of the National Prohibition Act. (R. 1.)

Petitioner's sole defense at the trial was that of entrapment. To prove the charges contained in the indictment, the Government called as witnesses two Federal prohibition agents, Martin and White. The purchase upon which the indictment was based was made by Martin. He testified that on Sunday, July 13, 1930, he visited petitioner's home and "in consequence of a conversation had with the defendant the defendant went off and returned shortly with a half-gallon of liquor for which the witness paid defendant the sum of $5.00." (R. 6.) Upon cross-examination Martin explained that this purchase was made under the following circumstances (R. 6–8):

> That he visited the home of the defendant on July 12th, 1930, at which time the defendant

was not at home and that he made such trip in company with two or three young men who were residents of the community in which the witness was temporarily staying. That on Sunday afternoon, July 13th, 1930, the witness again visited the home of the defendant, accompanied by Fanning Lowe, E. D. Jones, and C. J. Snyder. That upon their arrival at the home of the defendant the witness was introduced to the defendant by Fanning Lowe the witness being introduced as a resident of Charlotte, N. C., and a tourist stopping for the time being at Clyde, N. C. That the witness had a considerable conversation with the defendant, lasting between fifteen and thirty minutes and that during the conversation the witness ascertained that the defendant was a veteran of the World War and a former member of the 30th Division A. E. F. That the witness informed the defendant that he, the witness, was also an ex-service man and was also a former member of the 30th Division A. E. F., which in reality was the truth. That the witness asked the defendant if he, the defendant, could get him, the witness, some liquor and that at first the defendant stated that he did not have any liquor. That later in the conversation the witness again asked the defendant if he, the defendant, could get him, the witness, some liquor and that there was further conversation between the two relative to the securing of some liquor. That at the time of such conversation one of those present to wit, E. D. Jones,

was also an ex-service man and a former member of the 30th Division A. E. F. and some conversation was had between all present relative to the war experiences of the witness, the defendant and E. D. Jones. That the witness a third time asked the defendant to get him, the witness, some liquor and thereupon the defendant left his home and was gone a few minutes and came back with a half-gallon of liquor, for which the witness paid the defendant the sum of $5.00. That the witness was the first and only person among those present at the time who said anything about securing some liquor and was the first person to mention the subject. That the witness at the time he asked the defendant to secure some liquor for him, the witness, did so with the express view and purpose in mind to indict and prosecute the defendant for procuring and selling the liquor and that such was the purpose of the witness when he went to the home of the defendant and procured the liquor.

Martin also testified, on direct examination, over objection, that in August he accompanied agent White to petitioner's home to purchase another half gallon of whisky (R. 6), and White testified that petitioner sold him the whisky for $6, and said he "would guarantee it would be all right" (R. 4). White also testified that two weeks later, in company with Martin and another man, he searched the premises around the petitioner's house and found eleven one-half gallon fruit jars full of

whisky in a thicket about 100 yards below the house and a ten-gallon keg containing between three and four gallons of wine in a field just above the house. (R. 4, 13–16.) This search was made pursuant to a search warrant. (R. 14.)

The petitioner called as witnesses three men who were present when Martin made the purchase of July 13th. (R. 8–10, 10–11, 11–12.) These witnesses confirmed Martin's testimony. They were all residents of the community and acquaintances of the defendant. Two of them, Jones and Snyder, accompanied Martin to defendant's home, and Jones, who had "soldiered" in France with defendant, introduced Martin as a member of the 30th Division, A. E. F., in which all three men had served during the War. (R. 8–9.)

One of these witnesses testified that he knew that petitioner had been employed by a wood fibre company at Canton, North Carolina, since, 1924, and that he saw petitioner at work there practically every day. (R. 9–10.) This testimony was corroborated by the timekeeper and assistant paymaster of the company, who testified that petitioner had been "on his job continuously without missing a pay day since March, 1924." (R. 10.)

Neighbors of petitioner, who had known him for a number of years, testified that he bore a good reputation in the community. (R. 12–13.)

To rebut this testimony the Government called a number of witnesses who testified that petitioner

had the general reputation of being a rum runner. (R. 16–17.) Martin did not state what, if any, knowledge or information he personally had regarding petitioner before he went to his home on July 13, 1930. (R. 6–8.)

The record discloses no prior conviction of petitioner under the National Prohibition Act or any State liquor law.

Motions for a directed verdict were made by petitioner at appropriate intervals during the trial. These motions were denied and exceptions noted. (R. 8, 13, 17.)

Petitioner also presented certain requests for instructions on the subject of entrapment. (R. 17–18.) These were refused and an exception taken. (R. 17.) The trial judge charged the jury that as a matter of law the evidence did not show that petitioner was induced or entrapped to sell liquor. (R. 19.) Petitioner excepted to this charge (R. 19), and the jury returned a general verdict of guilty (R. 2, 19). After the denial of motions in arrest of judgment and to set aside the verdict, petitioner was sentenced to 18 months in the penitentiary. (R. 3, 19.)

Upon appeal to the Circuit Court of Appeals for the Fourth Circuit, the judgment of conviction was affrmed, one judge dissenting. (R. 26–40.)

This Court granted certiorari, the argument to be "limited to the question whether the evidence was sufficient to go to the jury upon the issue of entrapment." (R. 42.)

SUMMARY OF ARGUMENT

Since the defendant has intentionally committed all the acts constituting the crime charged against him, there is logical force to the view of the court below that the courts may not absolve him from guilt because an officer of the Government instigated the crime. We submit this view upon the opinion of the court below.

This position, however, is not supported by decisions in other Federal courts, which hold that the "defense" of entrapment is maintainable if the crime was induced by Government agents under circumstances which open the Government's action to condemnation upon grounds of public policy. We believe that there undoubtedly are cases where conduct on the part of Government officers is so plainly the provocation for violation of law that public policy requires that the courts should not permit a prosecution for such violation to continue. However, such conduct does not give rise to a defense, but rather calls into operation the courts' power to prevent official abuses.

Where the defendant's act has not been deprived of its criminality by conduct of the officer, the issue of entrapment can not properly be raised under a plea of not guilty, for inquiry regarding the actions of Government officials leads to examination of collateral and sometimes extremely prejudicial matters (such as suspicions of defendant's past criminality, his reputation in the community, and

evidence of other crimes) and prevents orderly inquiry by the same jury as to the defendant's guilt or innocence of the act charged. We submit, therefore, that the issue should be raised in advance of trial of the general issue, by a special plea in bar, since the defendant does not contend that he is not guilty, but that, for reasons of public policy, he should not be prosecuted. The procedure we suggest is supported by the rules of pleading in analogous situations, and will prevent the intrusion of confusion and prejudice. If, as we contend, the issue of entrapment could be raised only by a special plea in bar, the District Court did not err in declining to submit the question to the jury.

If it be said that, although the defense of entrapment is not open to the defendant upon a plea of not guilty, the court may nevertheless, on its own motion and at any stage of the proceedings, decline to proceed with the case for reasons of public policy, then we submit that the question whether the officer's conduct was proper must be decided by the judge, and not by the jury, whether it be one of fact or of law. In this view of the matter the decision below should be affirmed, on the ground that the District Judge concluded that the evidence did not sustain the defense; or, if it be thought that the Judge did not determine the questions of fact, the case should be remanded to the District Court for adjudication by the court of the issue whether defendant was entrapped.

ARGUMENT

We are not concerned with the admissibility of evidence obtained by officers of the Government in violation of statutory or constitutional provisions. Cf. *Olmstead* v. *United States,* 277 U. S. 438, 467, and *Weeks* v. *United States,* 232 U. S. 383. See also *People* v. *Defore,* 242 N. Y. 13. The act denounced as criminal by the statute was proved by undisputed evidence and the jury has found the defendant guilty. (R. 19.) The statute declared the act punishable, and the defendant has accordingly been sentenced. The only question presented is whether, upon the trial of the general issue tendered under a plea of not guilty, the jury should have been instructed to consider the issues arising with respect to the so-called "defense" of entrapment.

I

THERE IS LOGIC AND REASON TO SUPPORT THE CONCLUSION OF THE COURT BELOW THAT THE DEFENSE OF ENTRAPMENT IS NARROWLY CONFINED TO CASES WHERE THE DEFENDANT HAS NOT INTENTIONALLY COMMITTED AN ACT PROHIBITED AND DENOUNCED AS A CRIME BY STATUTE

The court below affirmed the conviction, holding broadly that a defense of entrapment may be maintained only where as the result of official inducement or deception the accused has committed a crime which he did not intend to commit, or where by reason of the consent implied in the inducement no crime has in fact been committed.

This Court has never sustained a defense of entrapment, or determined the basis upon which such a defense may be predicated. In a number of cases arising under the Postal Laws, in which officers of the Government, having information that the law was being violated, had written decoy letters requesting the defendant to send obscene matter through the mails, this Court has held that such inducement is no defense in a prosecution for acceding to the officer's request. *Rosen* v. *United States,* 161 U. S. 29, 42; *Andrews* v. *United States,* 162 U. S. 420; *Price* v. *United States,* 165 U. S. 311. See also *Grimm* v. *United States,* 156 U. S. 604; *Goode* v. *United States,* 159 U. S. 663. With the exception of cases of this class, the only decision of this Court in which such a defense has been discussed is *Casey* v. *United States,* 276 U. S. 413, where the majority of the Court declined to consider a defense of entrapment in the absence of objection taken in this Court or in the court below, because it could only do so upon its own motion and upon a record which was not intended to present the grounds for judgment upon that question.

Mr. Justice Brandeis and Mr. Justice Butler, dissenting from the judgment of the Court in the *Casey case,* were of the opinion that the defense should have been sustained on the Court's own motion and the prosecution stopped by vacating the

judgment of conviction with direction to quash the indictment.

The logical basis for the conclusion reached by the court below is found in the fact that the statute has denounced the act as a crime; that the act thus denounced has been committed by the defendant, whose acts involve all the elements of the crime; that under these circumstances the temptation held out to the defendant is no defense; and that unless authorized by statute the courts may not absolve the defendant from guilt or interpose a bar to the prosecution because an officer of the Government has instigated the crime.

Although this view is opposed by decisions of the Circuit Courts of Appeals in all of the other Circuits except the newly organized Tenth Circuit,[1] it presents a logical view of the matter which is open for consideration in this Court. And we submit the question upon the reasoning set forth in the opinion of the court below.

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[1] See *Capuano* v. *United States*, 9 F. (2d) 41 (C. C. A. 1st); *Lucadamo* v. *United States*, 280 Fed. 653 (C. C. A. 2d); *Zucker* v. *United States*, 288 Fed. 12 (C. C. A. 3d); certiorari denied, 262 U. S. 750, 756; *Newman* v. *United States*, 299 Fed. 128 (C. C. A. 4th); *Ybor* v. *United States*, 31 F. (2d) 42 (C. C. A. 5th); *Cermak* v. *United States*, 4 F. (2d) 99 (C. C. A. 6th); *O'Brien* v. *United States*, 51 F. (2d) 674 (C. C. A. 7th); *Butts* v. *United States*, 273 Fed. 35 (C. C. A. 8th); *Woo Wai* v. *United States*, 223 Fed. 412 (C. C. A. 9th).

II

THE DEFENDANT HAVING INTENTIONALLY COMMITTED THE CRIME ALLEGED IN THE INDICTMENT, THE FACT THAT HE WAS INDUCED TO DO SO BY OFFICERS OF THE GOVERNMENT SHOULD HAVE BEEN PLEADED IN BAR TO FURTHER PROCEEDINGS UPON THE INDICTMENT. NO SUCH DEFENSE MAY BE RAISED UNDER THE PLEA OF NOT GUILTY TRAVERSING THE INDICTMENT

Although the court below broadly held that a defense of entrapment may not be interposed if the voluntary acts of the defendant involve all the elements of a crime, the Circuit Courts of Appeals in all the other Circuits except the Tenth have under varying circumstances held the defense good if the crime charged was induced or instigated by governmental officers under circumstances which must be condemned upon grounds of public policy.[2] It is difficult to deduce from these decisions a general rule applicable in every case. The inquiry in each case is not whether the defendant committed the act which the statute denounces as a crime, but whether the officers were justified, under all the circumstances, in doing what they did to catch him in a violation of law.[3] These decisions rest upon

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[2] See footnote 1, *supra*, p. 11.

[3] It is clear, of course, that no question of entrapment is presented where a crime has already been committed and the accused is induced merely to disclose evidence of his wrongdoing. *Shields* v. *United States*, 26 F. (2d) 993 (App. D. C.), certiorari denied, 278 U. S. 633; *Luterman* v. *United States*, 281 Fed. 374 (C. C. A. 3d), certiorari denied (*sub nom. Glans* v. *United States*), 260 U. S. 732. Similarly, where a defendant suggests a course of criminal

grounds of public policy, recognized by the refusal of the courts to countenance the instigation of crimes by agents of the Government seeking to bring innocent people into the toils of the law. The reasoning which is opposed to the view of the court below is that the courts may, in order to protect the Government itself from the illegal conduct of its officers, and to preserve the purity of the courts in their administration of the law, decline to entertain prosecutions for crime instigated by officers of the Government. We are inclined to think that this is the proper view, because we know of no agency other than the courts which can effectively restrain the provocation of crime by agents of the Government when such abuses arise. The courts are the constituted agencies for the protection of the individual against the misuse of authority.

If the courts have, and are to exercise, the power to say that a man shall not be prosecuted or punished for an act which Congress has denounced as criminal, it is a matter of great importance for this Court to determine in what manner, and under what circumstances, this extraordinary power shall be exercised. Its exercise in the lower Federal courts is a matter of comparatively recent growth,

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action by some overt act, officers may, for the purpose of apprending him, cooperate with him unrestrainedly. *Newman* v. *United States*, 28 F. (2d) 681 (C. C. A. 9th), certiorari denied, 279 U. S. 839; *Grove* v. *United States*, 3 F. (2d) 965 (C. C. A. 4th), certiorari denied, 268 U. S. 691; *Orsatti* v. *United States*, 3 F. (2d) 778 (C. C. A. 9th), certiorari denied, 268 U. S. 694.

but of increasing frequency. (The defense no doubt had its origin in those cases where the acts of provocation in themselves deprive the act of the defendant of criminality.) In such cases the defense was not that the defendant committed the crime only because provoked to do so by officers of the Government, but that he had committed no crime at all. These are the cases in which the court below held the defense of entrapment to be proper. In such cases the issue is properly raised by a plea of not guilty. But where the defendant's act involves all the elements of a crime, and nothing that any officer has done has deprived it of criminality through the elimination of one of its essential elements, we submit that the issue can not properly be raised under a plea of not guilty.

We are not impelled to take this position in deference to a formal rule of procedure. The fact is that any inquiry regarding the conduct of the officers is quite inconsistent with an orderly inquiry by the same jury as to the defendant's guilt or innocence of the act charged in the indictment. In the first place, in determining whether the action of the officers was justified, the grounds they had for suspecting that the defendant was a lawbreaker, willing to violate the law if safe from detection, must be considered in every doubtful case. Complaints as to the past conduct of the defendant, knowledge and information brought to the attention of the authorities with respect to the defendant's activities preceding the offense in question,

and his reputation in the community are often relevant in justification of the action of the detecting officers.

The scope of the proof is well illustrated in the decided cases.

The opinions of this Court in the *Casey case* clearly indicate the character of the collateral issues which may be raised under such a defense as including circumstantial evidence or information concerning prior offenses sufficient to create probable cause for believing the defendant an habitual violator of the law—indeed, all the circumstances preceding the officers' transactions with the defendant which would justify or condemn their action (in the particular case) or have any tendency to show whether the defendant was an innocent man led into crime by officers of the law, or was ready and willing to violate the law if satisfied that the parties to the criminal transaction could be trusted not to betray him.

Thus, in *Billingsley* v. *United States,* 274 Fed. 86 (C. C. A. 6th), certiorari denied, 257 U. S. 656, the defendants were prosecuted for the illegal transportation of intoxicating liquors. The defense was that the accused had been enticed to violate the law by an agent of the Government, who encouraged and cooperated with them in the unlawful scheme. The prosecution was permitted to introduce evidence to show the officer's good faith, which disclosed that the accused, though ostensibly engaged in a lawful business, had for years past

participated in unlawful transactions of the character charged.

Similarly, in *Ybor* v. *United States,* 31 F. (2d) 42 (C. C. A. 5th), the court admitted evidence that a brewery, of which the defendant was an officer, had with defendant's knowledge been regularly paying protection money to Government agents as bearing on the issue whether the defendant had intended to pay the bribe for the giving of which he was being prosecuted, and as relevant to disprove the existence of unlawful entrapment.

Like inquiry into previous reputation and conduct was allowed in *Goldstein* v. *United States,* 256 Fed. 813 (C. C. A. 7th), and *Fetters* v. *United States,* 260 Fed. 142 (C. C. A. 9th), certiorari denied, 251 U. S. 554, to the apparent prejudice of the defendants. *St. Clair* v. *United States,* 17 F. (2d) 886 (C. C. A. 8th), states the rule frequently followed by the courts in disposing of the issue of entrapment, that where officers have reasonable cause to believe that the defendant has been violating the law, they may entrap him by suggesting a particular violation or by pretending participation in the crime. Where the defense is raised, therefore, the door is opened to practically unlimited declarations of suspicions concerning previous offenses, though the testimony introduced on that score clearly falls short of actual proof of wrongdoing; for, if proof of earlier crimes was at hand, the use of deception in order to obtain evidence to support the immediate prosecution would not be required.

The confusion which results from the trial of the issues raised by such a defense is shown by the situation which arose in *Corcoran* v. *United States,* 19 F. (2d) 901 (C. C. A. 8th). In that case the defendants objected to the admission of testimony that the authorities had received numerous complaints in person, by telephone and by letter, to the effect that the defendants were in the bootlegging business, and that these complaints were received prior to the time when the agents first approached the defendants on the subject of furnishing them with alcohol. These objections having been sustained, the court held that they could not thereafter consistently ask the court to consider the defense of entrapment. The unfairness of this ruling is quite obvious, since it compelled defendants on trial under a plea of not guilty either to abandon the defense of entrapment or to consent to the admission of testimony incompetent and highly prejudicial upon the trial of the general issue.

The collateral character of the issues raised by such a defense is demonstrated by the nature of the defense itself, which is well defined in the dissenting opinion of Mr. Justice Brandeis in the *Casey case, supra.* There it was said (276 U. S. at p. 423):

> The obstacle to the prosecution lies in the fact that the alleged crime was instigated by officers of the Government; that the act for which the Government seeks to punish the defendant is the fruit of their criminal

> conspiracy to induce its commission. The Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature. If Casey is guilty of the crime of purchasing 3.4 grains of morphine, on December 31st, as charged, it is because he yielded to the temptation presented by the officers. *Their conduct is not a defence to him.* For no officer of the Government has power to authorize the violation of an Act of Congress and no conduct of an officer can excuse the violation. But it does not follow that the court must suffer a detective-made criminal to be punished. To permit that would be tantamount to a ratification by the Government of the officer's unauthorized and unjustifiable conduct. (Italics ours.)

And in conclusion it was said (p. 425):

> The prosecution should be stopped, not because some right of Casey's has been denied, but in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts. In my opinion, the judgment should be vacated with direction to quash the indictment.

We believe this to be a correct characterization of the nature of the defense. There is nothing in the majority opinion in the *Casey case* to indicate that upon a proper record the nature of the defense would have been regarded differently by this Court. If it is not to be differently characterized, the conclusion follows that the matter should be

brought to the Court's attention upon motion so that the Court may act in the premises if public policy requires, or by plea in bar in advance of the trial on the general issue raised by a plea of not guilty. Any other procedure must prevent an orderly trial of the issues.

We are not unmindful that the usual practice in the several Circuits has been to try the issue of entrapment upon a plea of not guilty, but we believe that this has been done in the absence of objection and consideration of the question.[4]

The practice, however, has not been uniform. In *United States* v. *Pappagoda,* 288 Fed. 214 (Conn.), the defendant filed a plea in abatement and moved to quash the indictment on the ground that he had been entrapped. The court said the practice was unusual and unprecedented, and that the proper practice as indicated by the authorities was to raise the question on trial by a proper request to charge the jury. However, the court considered the merits, denied the motion, and overruled the plea. In *Spring Drug Co.* v. *United States,* 12 F. (2d) 852 (C. C. A. 8th), the District Court entertained and denied a motion to abate the indictment and to suppress the evidence because the sale of

[4] See *Patton* v. *United States,* 42 F. (2d) 68 (C. C. A. 8th); *Driskill* v. *United States,* 24 F. (2d) 525 (C. C. A. 9th); *Gargano* v. *United States,* 24 F. (2d) 625 (C. C. A. 5th); *Capuano* v. *United States,* 9 F. (2d) 41 (C. C. A. 1st). But cf. *United States* v. *Poppagoda,* 288 Fed. 214 Conn.).

narcotics had been instigated by Government agents engaged in a conspiracy to entrap the defendant. The Circuit Court of Appeals did not consider the propriety of this practice. In *United States ex rel. Hassel* v. *Mathues,* 22 F. (2d) 979 (E. D. Pa.), the defendants, held after hearing before a United States Commissioner to await the action of the grand jury, were discharged on a writ of habeas corpus upon the showing of entrapment made before the Commissioner, the court saying: "The policy of the law will not permit a prosecution based on such entrapment to be carried on." In *United States* v. *Echols,* 253 Fed. 862 (S. D. Tex.), upon a plea of guilty tendered by the defendant, the court of its own motion examined the defendant and the officers concerned in his arrest. Being satisfied that the officers had instigated the crime, the court declared that the rule of public policy required that the plea of guilty offered by the defendant be refused and the case dismissed.

While the authorities indicate that in a clear case the court, being satisfied upon the evidence adduced at any stage of the proceedings, may upon its own motion stop the prosecution and dismiss the indictment, there must, of course, be some inquiry regarding the facts in each case to determine whether the rule of public policy should or should not be applied. It may be that in the enforcement of this rule decision should rest exclusively with the court, and that conflicting inferences to be

drawn from the facts established should be drawn by the judge and not by the jury. If this be true, then the District Court in the case at bar was justified in declining to submit the question of entrapment to the jury, and the only question here presented would be whether upon any view of the facts he was justified in excluding the defense of entrapment.

If, however, the issue may be raised by the defendant, as other issues are, it should, we submit, be raised in advance of the trial of the general issue by special plea in bar, since the defendant's contention necessarily is that regardless of his guilt or innocence of the crime charged in the indictment he should not, for reasons of public policy, be put upon his defense.

The situation is closely analogous to a plea of pardon and pleas of *autrefois convict* or *autrefois acquit*. In such cases the defendant does not deny his guilt but sets up special facts in bar upon which the court must conclude, if his plea be sustained, that he may not be prosecuted, regardless of his guilt or innocence of the crime charged. Such defenses must be raised by special plea in bar. *United States* v. *Murdock*, 284 U. S. 141, 151; *United States* v. *Oppenheimer*, 242 U. S. 85; *United States* v. *Wilson*, 7 Pet. 150; *State* v. *Morgan*, 95 N. C. 641; *State* v. *Blalock*, 61 N. C. 242; *State* v. *Keith*, 63 N. C. 140; 1 *Hale, Pleas of the Crown*, 467; 2 *Hawkins, Pleas of the Crown*, 560 *et seq.*

The form of the plea of *autrefois acquit* indicates the precise analogy of such a plea to the defense of entrapment, for it recites that the defendant, coming into court and having heard the indictment read, "saith that our Lady the Queen ought not further to prosecute the said indictment against him," because he has already been acquitted of the charge. 1 *Archbold, Criminal Procedure* 112. So in this case the plea of the defendant, after having been indicted for an act which the statute denounces as a crime, is that he cometh into court and saith that because his crime was instigated by officers of the Government, the United States ought not further to prosecute the indictment against him. Such a plea can have no relation to the plea of not guilty, for the defendant's commission of the act charged in the indictment is entirely irrelevant upon the disposition of the plea.

While at common law any special matter may be adduced in support of the plea of not guilty to show that the defendant did not commit the crime with which he is charged, this principle clearly does not open the general issue to special defenses in bar which present matters entirely collateral to the charge in the indictment. To insist upon these rules of pleading in the conduct of criminal proceedings is not to insist upon the form and disregard the substance, because this and many other cases clearly show that the intrusion of the collateral issues, upon which the application of the rule of public policy

must depend, into the trial of the issue of guilt or innocence of the act charged, must inevitably result in confusion and prejudice.

Such confusion is avoided, even in cases involving constitutional rights, by insistence that the collateral issues shall whenever possible be determined in advance of trial. See *Cogen* v. *United States*, 278 U. S. 221, 223; *Segurola* v. *United States*, 275 U. S. 106; *Gouled* v. *United States*, 255 U. S. 298, 305; *Weeks* v. *United States*, 232 U. S. 383; *Adams* v. *New York*, 192 U. S. 585, 594.

The apparent object of all rules of pleading is not only to prevent surprise but to avoid confusion and prejudice in the trial of issues, and courts have rightly been insistent in confining the trial of the general issue in a criminal case to the issues raised by the plea of not guilty which traverses all the allegations of the indictment.[5] A corollary which proves the rule is that a special plea in bar which traverses the allegations of the indictment will not be sustained. *United States* v. *Kissell*, 218 U. S. 601.

If, as we maintain, the defense of entrapment may be raised by the defendant only by special plea in bar, the District Court did not err in failing to submit the question of entrapment to the jury.

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[5] Compare *Ford* v. *United States*, 273 U. S. 593, 605–606; *Dowdell* v. *United States*, 221 U. S. 325, 332; *United States* v. *Barber*, 219 U. S. 72, 78.

III

IF IN ENTRAPMENT CASES (THE CONDUCT OF THE OFFICERS) IS NOT A DEFENSE OPEN TO THE DEFENDANT UPON THE TRIAL OF THE GENERAL ISSUE, BUT NEVERTHELESS MAY BE NOTED AT ANY STAGE OF THE PROCEEDINGS BY THE COURT, UPON ITS OWN MOTION, TEEN THE QUESTION WAS ONE OF FACT FOR THE DECISION OF THE DISTRICT COURT WHERE THE WITNESSES WERE HEARD

We submit that upon the facts disclosed by the testimony of the witnesses with reference to the occurrences preceding the arrest of the defendant, viewed in the light of the testimony of three witnesses who testified orally in the presence of the court that he enjoyed the reputation of a bootlegger and a liquor dealer in the community in which he lived, coupled with the fact that shortly after the sale in question he made another sale, and upon a search of his premises was found to be in possession of a large store of liquor, the question of entrapment was one of fact; and if the District Judge concluded as a matter of fact that there was no merit in the defense, he was justified by the evidence in so doing. Such inferences may be properly drawn only by the judge who hears and sees the witnesses, and we submit that the question was essentially one of conflicting inferences of fact, to be predicated upon the weight to be given to the testimony of the witnesses who appeared in person before the District Court.

Unless the question was properly triable under the general issue, there was no error in declining to submit the question to the jury. If, however,

it was a question turning upon considerations of public policy to be determined by the court, then the decision below should either be affirmed upon the assumption that the District Judge himself concluded that the defense was not sustained by the evidence, or, if it be thought that he failed to determine the issues of fact, the case should be remanded to the District Court for the determination of the issue by the District Judge, for he alone was in a position to judge the credibility of the witnesses and to weigh the evidence accordingly.

CONCLUSION

It is submitted that the judgment below should be affirmed or, if not affirmed, that the case should be remanded to the District Court for determination of the issues of fact relating to the conduct of the arresting officer.

Respectfully submitted.

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U. S. GOVERNMENT PRINTING OFFICE: 1932

SUPREME COURT OF THE UNITED STATES.

No. 177.—October Term, 1932.

C. V. Sorrells, Petitioner,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 19, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Defendant was indicted on two counts (1) for possessing and (2) for selling, on July 13, 1930, one-half gallon of whiskey in violation of the National Prohibition Act. He pleaded not guilty. Upon the trial he relied upon the defense of entrapment. The court refused to sustain the defense, denying a motion to direct a verdict in favor of defendant and also refusing to submit the issue of entrapment to the jury. The court ruled that "as a matter of law" there was no entrapment. Verdict of guilty followed, motions in arrest, and to set aside the verdict as contrary to the law and the evidence, were denied, and defendant was sentenced to imprisonment for eighteen months. The Circuit Court of Appeals affirmed the judgment (57 F. (2d) 973) and this Court granted a writ of certiorari limited to the question whether the evidence was sufficient to go to the jury upon the issue of entrapment.

The Government, while supporting the conclusion of the court below, also urges that the defense, if available, should have been pleaded in bar to further proceedings under the indictment and could not be raised under the plea of not guilty. This question of pleading appropriately awaits the consideration of the nature and grounds of the defense.

The substance of the testimony at the trial as to entrapment was as follows: For the Government, one Martin, a prohibition agent, testified that having resided for a time in Haywood County, North Carolina, where he posed as a tourist, he visited defendant's home near Canton, on Sunday, July 13, 1930, accompanied by

three residents of the county who knew the defendant well. He was introduced as a resident of Charlotte who was stopping for a time at Clyde. The witness ascertained that defendant was a veteran of the World War and a former member of the 30th Division A. E. F. Witness informed defendant that he was also an ex-service man and a former member of the same Division, which was true. Witness asked defendant if he could get the witness some liquor and defendant stated that he did not have any. Later, there was a second request without result. One of those present, one Jones, was also an ex-service man and a former member of the 30th Division, and the conversation turned to the war experiences of the three. After this, witness asked defendant for a third time to get him some liquor, whereupon defendant left his home and after a few minutes came back with a half gallon of liquor for which the witness paid defendant five dollars. Martin also testified that he was "the first and only person among those present at the time who said anything about securing some liquor", and that his purpose was to prosecute the defendant for procuring and selling it. The Government rested its case on Martin's testimony.

Defendant called as witnesses the three persons who had accompanied the prohibition agent. In substance, they corroborated the latter's story but with some additions. Jones, a railroad employee, testified that he had introduced the agent to the defendant "as a furniture dealer of Charlotte," because the agent had so represented himself; that witness told defendant that the agent was "an old 30th Division man" and the agent thereupon said to defendant that he "would like to get a half gallon of whiskey to take back to Charlotte to a friend of his that was in the furniture business with him, and that defendant replied that he "did not fool with whiskey"; that the agent and his companions were at defendant's home "for probably an hour or an hour and a half and that during such time the agent asked the defendant three or four or probably five times to get him, the agent, some liquor". Defendant said "he would go and see if he could get a half gallon of liquor" and he returned with it after an absence of "between twenty and thirty minutes". Jones added that at that time he had never heard of defendant being in the liquor business, that he and the defendant were "two old buddies", and that he believed "one former war buddy would get liquor for another".

Another witness, the timekeeper and assistant paymaster of the Champion Fibre Company at Canton testified that defendant was an employee of that company and had been "on his job continuously without missing a pay day since March, 1924". Witness identified the time sheet showing this employment. This witness and three others who were neighbors of the defendant and had known him for many years testified to his good character.

To rebut this testimony, the Government called three witnesses who testified that the defendant had the general reputation of a rum runner. There was no evidence that the defendant had ever possessed or sold any intoxicating liquor prior to the transaction in question.

It is clear that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the prohibition agent, that it was the creature of his purpose, that defendant had no previous disposition to commit it but was an industrious, law-abiding citizen, and that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War. Such a gross abuse of authority given for the purpose of detecting and punishing crime, and not for the making of criminals, deserves the severest condemnation, but the question whether it precludes prosecution or affords a ground of defense, and, if so, upon what theory, has given rise to conflicting opinions.

It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. *Grimm* v. *United States,* 156 U. S. 604, 610; *Goode* v. *United States,* 159 U. S. 663, 669; *Rosen* v. *United States,* 161 U. S. 29, 42; *Andrews* v. *United States,* 162 U. S. 420, 423; *Price* v. *United States,* 165 U. S. 311, 315; *Bates* v. *United States,* 10 Fed. 92, 94; *Note.* p. 97. *United States* v. *Reisenweber,* 288 Fed. 520, 526; *Aultman* v. *United States,* 289 Fed. 251.[1] The ap-

[1]See, also, Regina *v.* Williams, 1 Car. & K. 195; People *v.* Mills, 178 N. Y. 274; People *v.* Ficke, 343 Ill. 367.

propriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.

The Circuit Court of Appeals reached the conclusion that the defense of entrapment can be maintained only where, as a result of inducement, the accused is placed in the attitude of having committed a crime which he did not intend to commit, or where, by reason of the consent implied in the inducement, no crime has in fact been committed. 57 F. (2d) p. 974. As illustrating the first class, reference is made to the case of a sale of liquor to an Indian who was disguised so as to mislead the accused as to his identity. *United States* v. *Healy*, 202 Fed. 349; *Voves* v. *United States*, 249 Fed. 191. In the second class are found cases such as those of larceny or rape where want of consent is an element of the crime. *Regina* v. *Fletcher*, 8 Cox. C. C. 131; *Rex* v. *McDaniel*, Fost. 121, 127, 128; *Connor* v. *People*, 18 Colo. 373; *Williams* v. *Georgia*, 55 Ga. 391; *United States* v. *Whittier*, 5 Dill. 35; *State* v. *Adams*, 115 N. C. 775. There may also be physical conditions which are essential to the offense and which do not exist in the case of a trap, as, for example, in the case of a prosecution for burglary where it appears that by reason of the trap there is no breaking.[2] *Rex* v. *Egginton*, 2 Leach, C. C. 913; *Regina* v. *Johnson*, Car. & Mar. 218; *Saunders* v. *People*, 38 Mich. 218; *People* v. *McCord*, 76 Mich. 200; *Allen* v. *State*, 40 Ala. 334; *Love* v. *People*, 160 Ill. 501. But these decisions applying accepted principles to particular offenses, do not reach, much less determine, the present question. Neither in reasoning nor in effect do they prescribe limits for the doctrine of entrapment.

While this Court has not spoken on the precise question (see *Casey* v. *United States*, 276 U. S. 413, 419, 423[3]), the weight of authority in the lower federal courts is decidedly in favor of the

[2]See note of Francis Wharton to Bates *v.* United States, 10 Fed. 97-99.
[3]Compare Olmstead *v.* United States, 277 U. S. 438.

view that in such case as the one before us the defense of entrapment is available. The Government concedes that its contention, in supporting the ruling of the Circuit Court of Appeals, is opposed by decisions in all the other Circuits except the Tenth Circuit, and no decision in that Circuit suggesting a different view has been brought to our attention. See *Capuano* v. *United States* (C. C. A. 1st), 9 F. (2d) 41, 42; *United States* v. *Lynch* (S. D. N. Y., Hough, J.), 256 Fed. 983, 984; *Lucadamo* v. *United States* (C. C. A. 2d), 280 Fed. 653, 657, 658; *Zucker* v. *United States* (C. C. A. 3d), 288 Fed. 12, 15; *Gargano* v. *United States* (C. C. A. 5th), 24 F. (2d) 625, 626; *Cermak* v. *United States* (C. C. A. 6th), 4 F. (2d) 99; *O'Brien* v. *United States* (C. C. A. 7th), 51 Fed. 674, 679, 680; *Butts* v. *United States* (C. C. A. 8th), 273 Fed. 35, 38; *Woo Wai* v. *United States* (C. C. A. 9th), 223 Fed. 412. And the Circuit Court of Appeals of the Fourth Circuit, in the instant case, was able to reach its conclusion only by declining to follow the rule which it had laid down in its earlier decision in *Newman* v. *United States*, 299 Fed. 128, 131.[4] It should be added that in many cases in which the evidence has been found insufficient to support the defense of entrapment the availability of that defense, on a showing of such facts as are present here, has been recognized.[5] The Federal courts have generally approved the statement of Circuit

[4]See, also, United States *v.* Adams, 59 Fed. 674; Sam Yick *v.* United States, 240 Fed. 60, 65; United States *v.* Echols, 253 Fed. 862; Peterson *v.* United States, 255 Fed. 433; Billingsley *v.* United States, 274 Fed. 86, 89; Luterman *v.* United States, 281 Fed. 374, 377; United States *v.* Pappagoda, 288 Fed. 214; Ritter *v.* United States, 293 Fed. 187; Di Salvo *v.* United States, 2 F. (2d) 222; Silk *v.* United States, 16 F. (2d) 568; Jarl *v.* United States, 19 F. (2d) 891; Corcoran *v.* United States, 19 F. (2d) 901; United States *v.* Washington, 20 F. (2d) 160; Cline *v.* United States, 20 F. (2d) 494; United States *v.* Mathues, 22 F. (2d) 979; Driskill *v.* United States, 24 F. (2d) 525; Ybor *v.* United States, 31 F. (2d) 42; Robinson *v.* United States, 32 F. (2d) 505; Vaccaro *v.* Collier, 38 F. (2d) 862; Patton *v.* United States, 42 F. (2d) 68; and cases collected in note in O'Brien *v.* United States, 51 F. (2d) 674, 678, including decisions of state courts. Compare Rex *v.* Titley, 14 Cox, C. C. 502; Blaikie *v.* Linton, 18 Scottish Law Rep. 583; London Law Times, July 30, 1881, p. 223; People *v.* Mills, 178 N. Y. 274; State *v.* Smith, 152 N. C. 798; Bauer *v.* Commonwealth, 135 Va. 463; State *v.* Gibbs, 109 Minn. 247; State *v.* Rippey, 127 S. C. 550. See, also, 18 A. L. R. Ann. 146; 28 Columbia Law Rev. 1067; 44 Harv. Law Rev. 109; 2 So. Cal. Law Rev. 283; 41 Yale Law J. 1249; 10 Va. Law Rev. 316; 9 Tex. Law Rev. 276.

[5]See cases cited in note 4.

Judge Sanborn in the leading case of *Butts* v. *United States, supra,* as follows: "The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it". The judgment in that case was reversed because of the 'fatal error' of the trial court in refusing to instruct the jury to that effect. In *Newman* v. *United States, supra,* the applicable principle was thus stated by Circuit Judge Woods: "It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor". These quotations sufficiently indicate the grounds of the decisions above cited.

The validity of the principle as thus stated and applied is challenged both upon theoretical and practical grounds. The argument, from the standpoint of principle, is that the court is called upon to try the accused for a particular offense which is defined by statute and that, if the evidence shows that this offense has knowingly been committed, it matters not that its commission was induced by officers of the Government in the manner and circumstances assumed. It is said that where one intentionally does an act in circumstances known to him, and the particular conduct is forbidden by the law in those circumstances, he intentionally breaks the law in the only sense in which the law considers intent. *Ellis* v. *United States,* 206 U. S. 246, 257. Moreover, that as the statute is designed to redress a public wrong, and not a private

injury, there is no ground for holding the Government estopped by the conduct of its officers from prosecuting the offender. To the suggestion of public policy the objectors answer that the legislature, acting within its constitutional authority, is the arbiter of public policy[6] and that, where conduct is expressly forbidden and penalized by a valid statute, the courts are not at liberty to disregard the law and to bar a prosecution for its violation because they are of the opinion that the crime has been instigated by government officials.

It is manifest that these arguments rest entirely upon the letter of the statute. They take no account of the fact that its application in the circumstances under consideration is foreign to its purpose; that such an application is so shocking to the sense of justice that it has been urged that it is the duty of the court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its courts. *Casey* v. *United States, supra.* But can an application of the statute having such an effect—creating a situation so contrary to the purpose of the law and so inconsistent with its proper enforcement as to invoke such a challenge—fairly be deemed to be within its intendment?

Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned. In *United States* v. *Palmer,* 3 Wheat. 610, 631, Chief Justice Marshall, in construing the Act of Congress of April 30, 1790, section 8 (1 Stat. 113) relating to robbery on the high seas, found that the words "any person or persons" were "broad enough to comprehend every human being", but he concluded that "general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them". In *United States* v. *Kirby,* 7 Wall. 482, the case arose under the Act of Congress of March 3, 1825 (4 Stat. 104) providing for the conviction of any person who "shall knowingly and willfully obstruct or retard the passage of the mail, or of any driver or carrier . . . carrying the same". Considering the purpose of the statute, the Court held that it had no application to the obstruction or retarding of the passage of the mail or of its carrier by reason of the arrest of the

[6]See C. B. & Q. R. R. Co. v. McGuire, 219 U. S. 549, 565; Green v. Frazier, 253 U. S. 233, 240.

carrier upon a warrant issued by a state court. The Court said: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter". And the Court supported this conclusion by reference to the classical illustrations found in Puffendorf and Plowden. *Id.*, pp. 486, 487.

Applying this principle in *Lau Ow Bew* v. *United States*, 144 U. S. 47, the Court decided that a statute requiring the permission of the Chinese government, and identification by certificate, of "every Chinese person other than a laborer", entitled by treaty or the act of Congress to come within the United States, did not apply to Chinese merchants already domiciled in the United States, who had left the country for temporary purposes, *animo revertendi*, and sought to reenter it on their return to their business and their homes. And in *United States* v. *Katz*, 271 U. S. 354, 362, construing section 10 of the National Prohibition Act so as to avoid an unreasonable application of its words, if taken literally, the Court again declared that "general terms descriptive of a class of persons made subject to a criminal statute may and should be limited where the literal application of the statute would lead to extreme or absurd results, and where the legislative purpose gathered from the whole Act would be satisfied by a more limited interpretation".[7] See, to the same effect, *Heydenfeldt* v. *Daney Gold Company*, 93 U. S. 634, 638; *Carlisle* v. *United States*, 16 Wall. 147, 153; *Oates* v. *National Bank*, 100 U. S. 239; *Chew Heong* v. *United States*, 112 U. S. 536, 555; *Holy Trinity Church*

[7] In Hawaii v. Mankichi, 190 U. S. 197, 214, the Court referred with approval to the following language of the Master of the Rolls (afterwards Lord Esher) in Plumstead Board of Works v. Spackman, L. R. 13 Q. B. D. 878, 887: "If there are no means of avoiding such an interpretation of the statute," (as will amount to a great hardship,) "a judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but to my mind a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an act of Parliament; and, unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended".

v. *United States,* 143 U. S. 457, 459-462; *Hawaii* v. *Mankichi,* 190 U. S. 197, 212-214; *Jacobson* v. *Massachusetts,* 197 U. S. 11, 39; *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 402; *Baender* v. *Barnett,* 255 U. S. 224, 226; *United States* v. *Chemical Foundation,* 272 U. S. 1, 18.

We think that this established principle of construction is applicable here. We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter to do violence to the spirit and purpose of the statute. This, we think, has been the underlying and controlling thought in the suggestions in judicial opinions that the Government in such a case is estopped to prosecute or that the courts should bar the prosecution. If the requirements of the highest public policy in the maintenance of the integrity of administration would preclude the enforcement of the statute in such circumstances as are present here, the same considerations justify the conclusion that the case lies outside the purview of the Act and that its general words should not be construed to demand a proceeding at once inconsistent with that policy and abhorrent to the sense of justice. This view does not derogate from the authority of the court to deal appropriately with abuses of its process and it obviates the objection to the exercise by the court of a dispensing power in forbidding the prosecution of one who is charged with conduct assumed to fall within the statute.

We are unable to approve the view that the court, although treating the statute as applicable despite the entrapment, and the defendant as guilty, has authority to grant immunity, or to adopt a procedure to that end. It is the function of the court to construe the statute, not to defeat it as construed. Clemency is the function of the Executive. *Ex parte United States,* 242 U. S. 27, 42. In that case, this Court decisively denied such authority to free guilty defendants, in holding that the court had no power to suspend sentences indefinitely. The Court, speaking by Chief Justice White, said—"if it be that the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous

to the legality of the conviction, it would seem necessarily to follow that there could be likewise implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced". And while recognizing the humane considerations which had led judges to adopt the practice of suspending sentences indefinitely in certain cases, the Court found no ground for approving the practice "since its exercise in the very nature of things amounts to a refusal by the judicial power to perform a duty resting upon it and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution". *Id.* pp. 51, 52. Where defendant has been duly indicted for an offense found to be within the statute, and the proper authorities seek to proceed with the prosecution, the court cannot refuse to try the case in the constitutional method because it desires to let the defendant go free.

Suggested analogies from procedure in civil cases are not helpful. When courts of law refuse to sustain alleged causes of action which grow out of illegal schemes, the applicable law itself denies the right to recover. Where courts of equity refuse equitable relief because complainants come with unclean hands, they are administering the principles of equitable jurisprudence governing equitable rights. But in a criminal prosecution, the statute defining the offense is necessarily the law of the case.

To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts. Judicial nullification of statutes, admittedly valid and applicable, has, happily, no place in our system. The Congress by legislation can always, if it desires, alter the effect of judicial construction of statutes. We conceive it to be our duty to construe the statute here in question reasonably, and we hold that it is beyond our prerogative to give the statute an unreasonable construction, confessedly contrary to public policy, and then to decline to enforce it.

The conclusion we have reached upon these grounds carries its own limitation. We are dealing with a statutory prohibition and

we are simply concerned to ascertain whether in the light of a plain public policy and of the proper administration of justice, conduct induced as stated should be deemed to be within that prohibition. We have no occasion to consider hypothetical cases of crimes so heinous or revolting that the applicable law would admit of no exceptions. No such situation is presented here. The question in each case must be determined by the scope of the law considered in the light of what may fairly be deemed to be its object.

Objections to the defense of entrapment are also urged upon practical grounds. But considerations of mere convenience must yield to the essential demands of justice. The argument is pressed that if the defense is available it will lead to the introduction of issues of a collateral character relating to the activities of the officials of the Government and to the conduct and purposes of the defendant previous to the alleged offense. For the defense of entrapment is not simply that the particular act was committed at the instance of government officials. That is often the case where the proper action of these officials leads to the revelation of criminal enterprises. *Grimm* v. *United States, supra.* The predisposition and criminal design of the defendant are relevant. But the issues raised and the evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials. If that is the fact, common justice requires that the accused be permitted to prove it. The Government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense.

What has been said indicates the answer to the contention of the Government that the defense of entrapment must be pleaded in bar to further proceedings under the indictment and cannot be raised under the plea of not guilty. This contention presupposes that the defense is available to the accused and relates only to the manner in which it shall be presented. The Government con-

siders the defense as analogous to a plea of pardon or of *autrefois convict* or *autrefois acquit.* It is assumed that the accused is not denying his guilt but is setting up special facts in bar upon which he relies regardless of his guilt or innocence of the crime charged. This, as we have seen, is a misconception. The defense is available, not in the view that the accused though guilty may go free, but that the Government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct. The Federal courts in sustaining the defense in such circumstances have proceeded in the view that the defendant is not guilty. The practice of requiring a plea in bar has not obtained. Fundamentally, the question is whether the defense, if the facts bear it out, takes the case out of the purview of the statute because it cannot be supposed that the Congress intended that the letter of its enactment should be used to support such a gross perversion of its purpose.

We are of the opinion that upon the evidence produced in the instant case the defense of entrapment was available and that the trial court was in error in holding that as a matter of law there was no entrapment and in refusing to submit the issue to the jury.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Judgment reversed.

Mr. Justice McReynolds is of the opinion that the judgment below should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 177.—October Term, 1932.

C. V. Sorrells, Petitioner,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 19, 1932.]

Mr. Justice Roberts.

The facts set forth in the court's opinion establish that a prohibition enforcement officer instigated the commission of the crime charged. The courts below held that the showing was insufficient, as matter of law, to sustain the claim of entrapment, and that the jury were properly instructed to ignore that defense in their consideration of the case. A conviction resulted. The Government maintains that the issue of entrapment is not triable under the plea of not guilty, but should be raised by plea in bar or be adjudicated in some manner by the court rather than by the jury, and as the trial court properly decided the question, the record presents no reversible error. I think, however, the judgment should be reversed, but for reasons and upon grounds other than those stated in the opinion of the court.

Of late the term "entrapment" has been adopted by the courts to signify instigation of crime by officers of government. The cases in which such incitement has been recognized as a defense have grown to an amazing total.[1] The increasing frequency of the assertion that the defendant was entrapped is doubtless due to the creation by statute of many new crimes, (e. g., sale and transportation of liquor and narcotics) and the correlative establishment of special enforcement bodies for the detection and punishment of offenders. The efforts of members of these forces to obtain arrests and convictions have too often been marked by reprehensible methods.

[1]See *O'Brien* v. *United States*, 51 F. (2d) 674, footnote 1, p. 678.

Society is at war with the criminal classes, and courts have uniformly held that in waging this warfare the forces of prevention and detection may use traps, decoys, and deception to obtain evidence of the commission of crime. Resort to such means does not render an indictment thereafter found a nullity nor call for the exclusion of evidence so procured.[2] But the defense here asserted involves more than obtaining evidence by artifice or deception. Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer. Federal and state courts have held that substantial proof of entrapment as thus defined calls for the submission of the issue to the jury and warrants an acquittal. The reasons assigned in support of this procedure have not been uniform. Thus it has been held that the acts of its officers estop the government to prove the offense. The result has also been justified by the mere statement of the rule that where entrapment is proved the defendant is not guilty of the crime charged. Often the defense has been permitted upon grounds of public policy, which the courts formulate by saying they will not permit their process to be used in aid of a scheme for the actual creation of a crime by those whose duty is to deter its commission.

This court has adverted to the doctrine,[3] but has not heretofore had occasion to determine its validity, the basis on which it should rest, or the procedure to be followed when it is involved. The present case affords the opportunity to settle these matters as respects the administration of the federal criminal law.

There is common agreement that where a law officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the consummation of so revolting a plan ought not to be permitted by any self respecting tribunal. Equally true is this whether the offense is one at common law or merely a creature of statute. Public policy forbids such sacrifice of decency. The enforcement of this policy calls upon the court, in every instance where alleged entrap-

[2]Compare *Olmstead* v. *United States*, 277 U. S. 438.
[3]*Casey* v. *United States*, 276 U. S. 413.

ment of a defendant is brought to its notice, to ascertain the facts, to appraise their effect upon the administration of justice, and to make such order with respect to the further prosecution of the cause as the circumstances require.

This view calls for no distinction between crimes *mala in se* and statutory offenses of lesser gravity; requires no statutory construction, and attributes no merit to a guilty defendant; but frankly recognizes the true foundation of the doctrine in the public policy which protects the purity of government and its processes. Always the courts refuse their aid in civil cases to the perpetration and consummation of an illegal scheme. Invariably they hold a civil action must be abated if its basis is violation of the decencies of life, disregard of the rules, statutory or common law, which formulate the ethics of men's relations to each other. Neither courts of equity nor those administering legal remedies tolerate the use of their process to consummate a wrong.[4] The doctrine of entrapment in criminal law is the analogue of the same rule applied in civil proceedings. And this is the real basis of the decisions approving the defense of entrapment, though in statement the rule is cloaked under a declaration that the government is estopped or the defendant has not been proved guilty.

A new method of rationalizing the defense is now asserted. This is to construe the act creating the offense by reading in a condition or proviso that if the offender shall have been entrapped into crime the law shall not apply to him. So, it is said, the true intent of the legislature will be effectuated. This seems a strained and unwarranted construction of the statute; and amounts, in fact, to judicial amendment. It is not merely broad construction, but addition of an element not contained in the legislation. The constituents of the offense are enumerated by the statute. If we assume the defendant to have been a person of upright purposes, law abiding, and not prone to crime,—induced against his own will and better judgment to become the instrument of the criminal purpose of another,—his action, so induced, none the less falls within the letter of the law and renders him amenable to its penalties.

[4]See *Hannay* v. *Eve*, 3 Cranch. 242, 247; *Bank of United States* v. *Owens*, 2 Pet. 527, 538; *Bartle* v. *Coleman*, 4 Pet. 184, 188; *Hanauer* v. *Doane*, 12 Wall. 342, 349; *Trist* v. *Child*, 21 Wall. 441, 448; *Hazelton* v. *Sheckells*, 202 U. S. 71; *Crocker* v. *United States*, 240 U. S. 74, 78.

Viewed in its true light entrapment is not a defense to him; his act, coupled with his intent to do the act, brings him within the definition of the law; he has no rights or equities by reason of his entrapment. It cannot truly be said that entrapment excuses him or contradicts the obvious fact of his commission of the offense. We cannot escape this conclusion by saying that where need arises the statute will be read as containing an implicit condition that it shall not apply in the case of entrapment. The effect of such construction is to add to the words of the statute a proviso which gives to the defendant a double defense under his plea of not guilty, namely, (a) that what he did does not fall within the definition of the statute, and (b) entrapment. This amounts to saying that one who with full intent commits the act defined by law as an offense is nevertheless by virtue of the unspoken and implied mandate of the statute to be adjudged not guilty by reason of someone's else improper conduct. It is merely to adopt a form of words to justify action which ought to be based on the inherent right of the court not to be made the instrument of wrong.

It is said that this case warrants such a construction of the applicable act, but that the question whether a similar construction will be required in the case of other or more serious crimes is not before the court. Thus no guide or rule is announced as to when a statute shall be read as excluding a case of entrapment; and no principle of statutory construction is suggested which would enable us to say that it is excluded by some statutes and not by others.

The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention.[5] Quite properly it may discharge the prisoner upon a writ of *habeas corpus*.[6] Equally well may it quash the indictment or entertain and try a plea in bar.[7] But its powers do not

[5]Compare *Gambino* v. *United States*, 275 U. S. 310, 319.

[6]See *United States ex rel. Hassell* v. *Mathues*, 22 F. (2d) 979.

[7]Compare *United States* v. *Pappagoda*, 288 Fed. 214; *Spring Drug Co.* v. *United States*, 12 F. (2d) 852.

end there. Proof of entrapment, at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty.[8] If in doubt as to the facts it may submit the issue of entrapment to a jury for advice. But whatever may be the finding upon such submission the power and the duty to act remain with the court and not with the jury.

Such action does not grant immunity to a guilty defendant. But to afford him as his right a defense founded not on the statute, but on the court's view of what the legislature is assumed to have meant, is to grant him unwarranted immunity. If the court may construe an act of Congress so as to create a defense for one whose guilt the act pronounces, no reason is apparent why the same statute may not be modified by a similar process of construction as to the penalty prescribed. But it is settled that this may not be done. *Ex parte United States*, 242 U. S. 27. The broad distinction between the refusal to lend the aid of the court's own processes to the consummation of a wrong and the attempt to modify by judicial legislation the mandate of the statute as to the punishment to be imposed after trial and conviction is so obvious as not to need discussion.

Recognition of the defense of entrapment as belonging to the defendant and as raising an issue for decision by the jury called to try him upon plea of the general issue, results in the trial of a false issue wholly outside the true rule which should be applied by the courts. It has been generally held, where the defendant has proved an entrapment, it is permissible for the government to show in rebuttal that the officer guilty of incitement of the crime had reasonable cause to believe the defendant was a person disposed to commit the offense. This procedure is approved by the opinion of the court. The proof received in rebuttal usually amounts to no more than that the defendant had a bad reputation, or that he had been previously convicted. Is the statute upon

[8]In *United States* v. *Echols*, 253 Fed. 862, upon the tender of a plea of guilty, the court of its own motion examined the prisoner and the officers concerned in his arrest; and being satisfied that these officers had instigated the crime, declared that public policy required that the plea be refused and the case dismissed. In *United States* v. *Healy*, 202 Fed. 349, a judgment and sentence were set aside and the defendant discharged upon the court's ascertaining that the conviction was procured by entrapment.

which the indictment is based to be further construed as removing the defense of entrapment from such a defendant?

Whatever may be the demerits of the defendant or his previous infractions of law these will not justify the instigation and creation of a new crime, as a means to reach him and punish him for his past misdemeanors. He has committed the crime in question, but, by supposition, only because of instigation and inducement by a government officer. To say that such conduct by an official of government is condoned and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed is wholly to disregard the reason for refusing the processes of the court to consummate an abhorrent transaction. It is to discard the basis of the doctrine and in effect to weigh the equities as between the government and the defendant when there are in truth no equities belonging to the latter, and when the rule of action cannot rest on any estimate of the good which may come of the conviction of the offender by foul means. The accepted procedure, in effect, pivots conviction in such cases, not on the commission of the crime charged, but on the prior reputation or some former act or acts of the defendant not mentioned in the indictment.

The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy.

The judgment should be reversed and the cause remanded to the District Court with instructions to quash the indictment and discharge the defendant.

Mr. Justice BRANDEIS and Mr. Justice STONE concur in this opinion.